THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4
Mx.North

UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-family-division_1949

1949

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL:

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR - - - - RALPH SUTTON, K.C.
ASSOCIATE EDITOR - - HENRY SALT, K.C.

REPORTERS:

Court of Appeal -	H. C. GARSIA, C. G. MORAN, L. F. J. McDERMOTT, R. P. COLINVAUX,	*Barristers-at-Law*
Probate and Divorce -	J. B. GARDNER,	*Barrister-at-Law*
Admiralty Caſes and Eccleſiaſtical Caſes -	H. GREENFIELD,	*Barrister-at-Law*
	R. C. CALBURN,	*Barrister-at-Law*

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 6 STONE BUILDINGS,
LINCOLN'S INN, LONDON, W.C.2,
AND
PRINTED BY GEO. BARBER & SON LTD., 23 FURNIVAL STREET,
LONDON, E.C.4.

P. 1949. b 5

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES

MEMBERS OF THE COUNCIL

Chairman—Sir Stanley Pott

Vice-Chairman—J. H. Stamp, Esq.

EX-OFFICIO MEMBERS

Right Hon. Sir Hartley Shawcross, K.C., M.P.
Attorney-General

Right Hon. Sir Frank Soskice, K.C., M.P. Solicitor-General

Harold N. Smart, Esq., C.M.G., O.B.E., J.P.,
President of the Law Society

ELECTED MEMBERS

J. H. Stamp, Esq. The Right Hon. Lord Justice Jenkins	Lincoln's Inn
R. E. Burrell, Esq., K.C. J. V. Nesbitt, Esq.	Inner Temple
W. Price, Esq. W. Latey, Esq., M.B.E.	Middle Temple
Sir William L. McNair, K.C. S. E. Pocock, Esq., O.B.E.	Gray's Inn
H. Edmund Davies, Esq., K.C. R. E. Megarry, Esq.	Appointed on the nomination of the General Council of the Bar
Sir Stanley Pott (Firm : Messrs. Holmes, Son & Pott) G. D. Colclough, Esq. (Firm : Messrs. Johnson, Jecks & Colclough)	The Law Society

Secretary—J. H. Bowman, Esq.
6 Stone Buildings, Lincoln's Inn, W.C.2.

BIBL. LONDIN. UNIV.

JUDGES

OF

THE COURT OF APPEAL

1949

Lord Jowitt, Lord Chancellor	
Lord Goddard, Lord Chief Justice of England	
Lord Greene	Masters of the Rolls
Sir Francis Raymond Evershed	
Lord Merriman	President of the Probate, Divorce, and Admiralty Division
Sir Frederick James Tucker	Lords Justices
Sir Alfred Townsend Bucknill	
Sir Donald Bradley Somervell	
Sir Lionel Leonard Cohen	
Sir Cyril Asquith	
Sir Francis Raymond Evershed (appointed Master of the Rolls May 28, 1949)	
Sir John Edward Singleton	
Sir Alfred Thompson Denning	
Sir David Llewellyn Jenkins (appointed May 28, 1949)	

JUDGES

OF THE

PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE

1949

Lord MERRIMAN, President
Sir FRANCIS LORD CHARLTON HODSON
Sir GONNE ST. CLAIR PILCHER
Sir HUBERT JOSEPH WALLINGTON
Sir HENRY WILLIAM BARNARD
Sir HENRY GORDON WILLMER
Sir BENJAMIN ORMEROD
Sir EDWARD HOLROYD PEARCE

Attorney-General

Sir HARTLEY WILLIAM SHAWCROSS

Solicitor-General

Sir FRANK SOSKICE

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1949, will be as follows :—

In the First Series,
[1949] Ch.
In the Second Series,
[1949] 1 K. B. [1949] 2 K. B. [1949] P.
In the Third Series,
[1949] A. C.

TABLE OF CASES REPORTED
IN THIS VOLUME

PAGE

A.

Andrews *v.* Wingham. In re Wingham, decd. – – – 187
Attorney-General, Battle *v.* – 358
Attorney-General, Russell *v.* – 391

B.

Barber *v.* Barber – – – 169
Barker *v.* Barker – – – 219
Battle *v.* Attorney-General (Battle G. L. and Battle A. F. Intervening) – – – 358
Bernbaum *v.* Bernbaum – – 325
Bowman *v.* Bowman. In the Matter of a Proposed Petition 353
Bown *v.* Bown and Weston – 91

C.

Casey *v.* Casey – – – 420
Cavendish-Bentinck *v.* Cavendish-Bentinck – – – 203
Chaplin *v.* Chaplin – – 72
Charles Gibson, decd. In the Estate of – – – – 434
Church of the Holy Trinity, Woolwich, In re – – 369

D.

Dancer *v.* Dancer (Hare Intervening : Marsden cited) – 147
Davies *v.* Davies. In the Estate of Rachel Thomas, decd. – 336

PAGE

Donaldson (or Nichols) *v.* Donaldson (Donaldson Intervening : Nichols cited) – – 363
Dunn *v.* Dunn – – – 98

E.

E.L., R.E.L. (orse. R.) *v.* – 211
Everitt *v.* Everitt – – – 374

F.

Fairman *v.* Fairman – – 341

G.

Goenaga, decd. In the Estate of 367
Gunner *v.* Gunner and Stirling 77

H.

Hadlum *v.* Hadlum – – – 197
Harthan *v.* Harthan – – 115
Hopes *v.* Hopes – – – 227

J.

Johnson, Vere-Wardale *v.* Vere-Wardale, decd. – – – 395

L.

Land *v.* Land – – – 405
Lauder *v.* Lauder – – – 277

M.

M.T. *v.* M.T. and the Official Solicitor – – – – 331
Macrae *v.* Macrae – – 272, 397
Mayo *v.* Mayo – – – 172
McTaggart *v.* McTaggart – 94

O.

Official Solicitor, M. T. and, M. T. *v.* – – – – 331
Orr-Lewis *v.* Orr-Lewis – – 347
Owners of the Steamship Towerfield *v.* Workington Harbour and Dock Board. The Towerfield – – – – – 10

R.

R.E.L. (otherwise R.) *v.* E.L. – 211
Rachel Thomas, decd., In the Estate of. Davies *v.* Davies 336
Richardson, Spicer *v.* In the Goods of Spicer, decd. – 441
Russell *v.* Attorney-General – 391

S.

S. *v.* S. – – – – 269
Sobieski, The – – – 313
Squire *v.* Squire – – – 51

PAGE

Spicer, decd. In the Goods of. Spicer *v.* Richardson – – 441
Stone *v.* Stone – – – 165

T.

Thomas, In the Estate of Rachel, decd. Davies *v.* Davies – – – – 336
Tilley *v.* Tilley – – – 240
Tucker *v.* Tucker – – – 105

U.

Usmar *v.* Usmar – – – 1

V.

Vere-Wardale, decd. Vere-Wardale *v.* Johnson – – 395

W.

Walsham *v.* Walsham – – 350
Wingham, decd. In re. Andrews *v.* Wingham – – – 187
Winnan *v.* Winnan – – 174
Woodbury *v.* Woodbury – – 154
Workington Harbour and Dock Board, Owners of S.S. Towerfield *v.* The Towerfield – 10

CASES JUDICIALLY CONSIDERED

A. v. *A.* (*sued as B.*) (1887) 19 L. R. Ir. 403
Not followed. Harthan *v.* Harthan - - - **C. A. 115**

Anderson, In the Estate of - [1944] P. 1
Overruled. *In re* Wingham, decd. Andrews *v.* Wingham **C. A. 187**

Astle v. *Astle* - - - [1939] P. 415
Criticized and distinguished Squire *v.* Squire - - **C. A. 51**

Basing v. *Basing* (1864) 3 Sw. & Tr. 516
Applied. Everitt *v.* Everitt **C. A. 374**

Beech, decd., In the Estate of. Beech v. *Public Trustee* [1923] P. 46.
Distinguished. In the Goods of Spicer, decd. Spicer *v.* Richardson - - **Hodson J. 441**

Bowles v. *Jackson* (1854) 1 Sp. Ecc. & Ad. 294.
Overruled. *In re* Wingham, decd. Andrews *v.* Wingham **C. A. 187**

Churchman v. *Churchman* [1945] P. 44
Considered. Tilley *v.* Tilley **C. A. 240**

Davey, Arthur Henry (known as Robert Henry Davy), In the Matter of [1935] P. 1.
Followed. Battle *v.* Attorney-General (Battle, G. L. and Battle, A. F., intervening) **Hodson J. 358**

De Reneville v. *De Reneville* [1948] P. 100
Followed. Casey *v.* Casey **C. A. 420**

Dunn v. *Dunn* - (1860) 1 Sw. & T. 521
Applied. In the Estate of Rachel Thomas, decd. Davies *v.* Davies - - **Barnard J. 336**

Emanuel v. *Emanuel* - - [1946] P. 115
Considered. Dunn *v.* Dunn **C. A. 98**

Evans v. *Evans* - - [1948] 1 K. B. 175
Disapproved by Denning L.J. Hopes *v.* Hopes - **C. A. 227**

F. v. *F.* - - - [1945] S. C. 202
Approved and applied. Harthan *v.* Harthan - - **C. A. 115**

Finney v. *Finney* (1868) L. R. 1 P. & M. 483
Applied. Winnan *v.* Winnan **C. A. 174**

Forsyth v. *Forsyth* - [1948] P. 125
Followed. Macrae *v.* Macrae **Divl. Ct. 272**
C. A. 397

Gaskill v. *Gaskill* - - - [1921] P. 425
Considered. Hadlum *v.* Hadlum **C. A. 197**

Gaskill v. *Gaskill* - - - [1921] P. 425
Considered. M. T. *v.* M. T. and Official Solicitor **Ormerod J. 331**

Gibson, In the Estate of - [1941] P. 118
Overruled. *In re* Wingham, decd. Andrews *v.* Wingham **C. A. 187**

Ginesi v. *Ginesi* - - [1948] P. 179
Applied. Fairman *v.* Fairman **Divl. Ct. 341**

Glenister v. *Glenister* - - [1945] P. 30
Applied. Everitt *v.* Everitt **C. A. 374**

Gunner v. *Gunner and Stirling* [1949] P. 77
Followed. Bown *v.* Bown and Weston - **Wallington J. 91**

Gunstan, Re Goods of. Blake v. *Blake* (1882) 7 P. D. 102.
Applied. In the Estate of Charles Gibson, decd. **Pearce J. 434**

Hadden v. *Hadden* (1919) The Times Newspaper, December 5.
Dictum of Shearman J. approved. Squire *v.* Squire - **C. A. 51**

Hill, In re the Estate of. (1845) 1 Rob. Ecc. 276.
Overruled. *In re* Wingham. Andrews *v.* Wingham **C. A. 187**

Hopes v. *Hopes* - - - [1949] P. 327
Considered. Everitt *v.* Everitt **C. A. 374**

Hopkins v. *Hopkins* - - [1914] P. 282
Not followed. Laud *v.* Laud **Divl. Ct. 405**

Hudson v. *Parker* (1844) 1 Rob. Ecc. 14
Applied. In the Estate of Charles Gibson, decd. **Pearce J. 434**

Inverclyde v. *Inverclyde* - - [1931] P. 29
Approved. Casey *v.* Casey **C.A. 420**

La Cloche v. *La Cloche and, by revivor, La Cloche* v. *the Viscount of Jersey* (1872) L. R. 4 P. C. 325.
Applied. Battle *v.* Attorney-General (Battle G. L. and Battle A. F. Intervening). **Hodson J. 358**

Lodge v. *Lodge* - (1890) 15 P. D. 159
Overruled. Everitt *v.* Everitt **C. A. 374**

Macrae v. *Macrae* - - [1949] P. 272
Affirmed. - - **C. A. 397**

Mansey v. *Mansey* - - [1940] P. 139
Considered. Dunn *v.* Dunn **C. A. 98**

McM. v. *McM.*, *McK.* v. *McK.* (1936) Ir. R. 177.
Not followed. Harthan *v.* Harthan - - **C. A. 115**

Moss v. *Moss* - - - [1916] P. 155
Applied. Lauder *v.* Lauder **C. A. 277**

Norris v. *Allen* - (1862) 2 Sw. & T. 601
Applied. In the Estate of Rachel Thomas, decd. Davies *v.* Davies - - **Barnard J. 336**

Norton v. *Soten* - (1819) 3 Phill. Ecc. 147
Distinguished and explained. Harthan *v.* Harthan - **C. A. 115**

Ogden v. *Ogden* - - - [1908] P. 46
Considered. Casey *v.* Casey **C. A. 420**

Pickavance v. *Pickavance* - [1901] P. 60
Considered. Laud *v.* Laud **Divl. Ct. 405**

Rex v. *Tate* - - - [1908] 2 K. B. 680
Followed. Fairman *v.* Fairman **Divl. Ct. 341**

Russell v. *Russell* - - [1897] A. C. 395
Applied. Lauder *v.* Lauder **C. A. 277**

Shilston v. *Shilston* - (1945) 174 L. T. 105
Distinguished. Hopes *v.* Hopes **C. A. 227**

Smith v. *Smith* - - - [1940] P. 49
Distinguished. Hopes *v.* Hopes **C. A. 227**

Spring v. *Spring and Jiggins* [1947] 1 All E. R. 886.
Disapproved. Fairman *v.* Fairman **Divl. Ct. 341**

Stable, decd., In re. Dalrymple v. *Campbell* [1919] P. 7.
Applied. In the Goods of Spicer. Spicer *v.* Richardson **Hodson J. 441**

Statham v. *Statham* - - [1929] P. 130
Followed. Fairman *v.* Fairman **Divl. Ct. 341**

Wanbon v. *Wanbon* [1946] 2 All E. R. 366
Doubted. Hopes *v.* Hopes **C. A. 227**

Wilkes v. *Wilkes* - - - [1943] P. 41
Distinguished. Hopes *v.* Hopes **C. A. 227**

Winter v. *Winter* - - - [1942] P. 151
Considered and distinguished. Tucker *v.* Tucker **Divl. Ct. 105**

Wood v. *Wood* - - - [1947] P. 103
Considered. Hadlum *v.* Hadlum **C. A. 197**

Zealley v. *Veryard and Bridle* (1866) L. R. 1 P. & M. 195.
Applied. In the Estate of Rachel Thomas, decd. Davies *v.* Davies - - **Barnard J. 336**

STATUTES JUDICIALLY CONSIDERED

1823

Marriage Act, 1823 (4 *Geo.* 4, *c.* 76), *ss.* 7, 22 Dancer *v.* Dancer (Hare intervening. Marsden cited) **Ormerod J. 147**

—— —— *s.* 22. Russell *v.* Attorney-General - **Barnard J. 391**

1836

Marriage Act, 1836 (6 & 7 *Will.* 4, *c.* 85), *ss.* 10, 42. Russell *v.* Attorney-General - **Barnard J. 391**

1837

Wills Act, 1837 (1 *Vict.*, *c.* 26), *s.* 9. In the Estate of Charles Gibson, decd. **Pearce J. 434**

—— —— *s.* 11. *In re* Wingham, decd. Andrews *v.* Wingham **C. A. 187**

1847

Harbours Docks and Piers Clauses Act, 1847 (10 & 11 *Vict.*, *c.* 27), *s.* 74. Owners of the Steamship Towerfield *v.* Workington Harbour and Dock Board. The Towerfield - - - **C. A. 10**

1857

Court of Probate Act, 1857 (20 & 21 *Vict.* *c.* 77), *s.* 59. In the Estate of Rachel Thomas, decd. Davies *v.* Davies **Barnard J. 336**

1858

Court of Probate Act, 1858 (21 & 22 *Vict.*, *c.* 95), *s.* 10. In the Estate of Rachel Thomas, decd. Davies *v.* Davies - **Barnard J. 336**

1874

Births and Deaths Registration Act, 1874 (37 & 38 *Vict.*, *c.* 88), *ss.* 1, 7. Mayo *v.* Mayo **Blanco-White, Commr. 172**

1881

Summary Jurisdiction (*Process*) *Act*, 1881 (44 & 45 *Vict.*, *c.* 24). Macrae *v.* Macrae - - - **Divl. Ct. 272** **C. A. 397**

1882

Married Women's Property Act, 1882 (45 & 46 *Vict.*, *c.* 75). Bernbaum *v.* Bernbaum - - **C. A. 325**

—— —— *s.* 11. Gunner *v.* Gunner and Stirling **Wallington J. 77**

1886

Guardianship of Infants Act, 1886 (49 & 50 *Vict.*, *c.* 27), *s.* 7. S. *v.* S. **Hodson J. 269**

1895

Summary Jurisdiction (*Separation and Maintenance*) *Acts*, 1895 *to* 1925. Macrae *v.* Macrae - **Divl. Ct. 272** **C. A. 397**

—— —— Laud *v.* Laud **Divl. Ct. 405**

Summary Jurisdiction (*Married Women*) *Act*, 1895 (58 & 59 *Vict.*, *c.* 39), *ss.* 4, 5. Barker *v.* Barker **Divl. Ct. 219**

1898

Marriage Act, 1898 (61 & 62 *Vict.*, *c.* 58), *ss.* 1, 4, 6, 15. Russell *v.* Attorney General **Barnard J. 391**

1911

Maritime Conventions Act, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1, *sub-s.* 1; *s.* 9, *sub-s.* 4. The Sobieski **C. A. 313**

1913

Pilotage Act, 1913 (2 & 3 *Geo.* 5, *c.* 31), *s.* 15. Owners of Ss. Towerfield *v.* Workington Harbour and Dock Board. The Towerfield **C. A. 10**

Wills (*Soldiers and Sailors*) *Act*, 1913 (7 & 8 *Geo.* 5, *c.* 58), *ss.* 2 *and* 5. *In re* Wingham, decd. Andrews *v.* Wingham - - **C. A. 187**

1925

Guardianship of Infants Act, 1925 (15 & 16 *Geo.* 5, *c.* 45), *s.* 4. S. *v.* S. **Hodson J. 269**

Court of Judicature (*Consolidation*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 1, 27, 32, 176, 190, *sub-s.* 3. Cavendish-Bentinck *v.* Cavendish-Bentinck **C. A. 203**

—— —— *s.* 150. In the Estate of Rachel Thomas, decd. Davies *v.* Davies **Barnard J. 336**

—— —— *s.* 176 (*c*). Usmar *v.* Usmar **Willmer J. 1**

—— —— *s.* 192. Gunner *v.* Gunner and Stirling - **Wallington J. 77**

—— —— *s.* 192. Bown *v.* Bown and Weston - - **Wallington J. 91**

—— —— *s.* 198. Barber *v.* Barber **Willmer J. 169**

—— —— *s.* 198. Tilley *v.* Tilley **C. A. 240**

1926

Legitimacy Act, 1926 (16 & 17 *Geo.* 5, *c.* 60). Battle *v.* Attorney-General (Battle, G. L. and Battle A. F. intervening) - **Hodson J. 358**

1934

County Courts Act, 1934 (24 & 25 *Geo.* 5, *c.* 53), *ss.* 60, 61. In the Estate of Rachel Thomas, decd. Davies *v.* Davies - **Barnard J. 336**

1937

Matrimonial Causes Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 1. Bowman *v.* Bowman - - - **C. A. 353**

—— —— *s.* 2. Usmar *v.* Usmar **Willmer J. 1**

—— —— *s.* 2. Lauder *v.* Lauder **C. A. 277**

—— —— *s.* 4. Tilley *v.* Tilley **C. A. 240**

—— —— *s.* 7, *sub-s.* 1 (ii). Chaplin *v.* Chaplin - - - **C. A. 72**

RULES AND ORDERS JUDICIALLY CONSIDERED

R. S. C. Or. 54, *rr.* 12A, 21, 22A. BERNBAUM *v.* BERNBAUM - **C. A. 325**

1947

Matrimonial Causes Rules, 1947, *r.* 36, *sub-r.* 1. TUCKER *v.* TUCKER **Divl. Ct. 105**

—— —— *rr.* 59, 82. BERNBAUM *v.* BERNBAUM - - - **C. A. 325**

CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

USMAR *v.* USMAR.

1948
Apr. 6, 7, 8, 9, 12, 13, 14, 15:
May 3.

Willmer J.

Divorce — Cruelty — Constant and perpetual nagging — Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 176 (*c*)—*Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 57), *s.* 2.

Although it is clear that the court cannot give relief merely on the ground of matrimonial unhappiness, constant and perpetual nagging by the respondent when accompanied by injury or reasonable apprehension of injury to the health of the petitioner, may amount to such an unwarranted interference in the life of the petitioner as to justify the court in finding cruelty.

DEFENDED matrimonial cause in which both parties alleged cruelty. The husband by his petition alleged perpetual and constant nagging over many years; the wife by her answer alleged inter alia unkind and abusive speech, nagging and neglect, over-familiarity with women friends which, while short of adultery, went beyond what was proper for a married man, threats of violence and violence.

The marriage took place in 1933. In 1934 the petitioner, with financial help from the respondent's parents, qualified as

1948

USMAR
v.
USMAR.

a doctor. It was common ground that in 1935 the petitioner indulged in flirtations with two ladies. The associations were ended that year, and the petitioner and respondent moved to a different town in which the petitioner was still practising at the hearing of the petition; but the respondent never allowed her husband to forget the incidents of 1935. There was constant and increasing trouble between the parties over many matters, which are referred to in the judgment; and by the end of 1945 the petitioner found it necessary because of his ill-health to consult a distinguished psychiatrist, who gave evidence at the trial. Both parties alleged assaults and threats in 1946, and in July, 1946, the petitioner left the matrimonial home and did not return to it. The respondent then began writing complaints on postcards and made defamatory remarks about her husband in public; and she wrote to the local coroner saying that she intended to kill the children of the marriage and commit suicide. In April, 1947, she filed a petition for restitution of conjugal rights; the husband by his answer alleged that he had just cause for leaving her and filed his petition for divorce. The restitution proceedings were terminated.

Gilbert Beyfus K.C. and *C. A. Marshall-Reynolds*, for the husband petitioner.

S. E. Karminski K.C. and *Colin Duncan*, for the wife respondent.

WILLMER J. The nature of the husband's case as it was presented to me in opening and through the very lengthy body of evidence that I have heard, is that he complains of perpetual and constant nagging on the part of his wife over a period of many, many years. There are, it is true, subsidiary charges, but the gravamen of his case is that his wife made his life a misery by nagging. The wife's case is rather more varied. [His Lordship referred in detail to the history of the marriage and to the incidents which were alleged to have taken place, and continued :] That is the state of the evidence on which the various charges on either side are based. It will be convenient if I deal first with the wife's case against the husband, which has been conveniently sub-divided by her counsel into four main headings: complaints of continued associations with other women, in which she charged her husband with over-familiarity not reaching the point of adultery, but going beyond what was proper in a married man; complaints that from at least 1943 he has continually abused her, nagged her, and generally neglected her; complaints of assaults and threats of assault; and, lastly, complaints of certain sexual perversions.

The petitioner has made light of his association with the two ladies at Leeds in 1935. In one case he says that the whole affair was confined to a single kiss; in the other, he admits that it was a little more serious but, nevertheless, of very minor significance. I do not feel wholly disposed to accept that. It did make a very deep impression on the mind of the wife, and I feel satisfied that both these affairs were rather more serious than the husband has been prepared to admit. But they are long since dead and buried, and there is no evidence at all that the husband has even so much as seen either of these two ladies since 1935; and it is important to notice that from that time onwards he has done the best he could to repair the damage so far as these two ladies are concerned.

[His Lordship said that there was no evidence of any impropriety at all in the case of two other ladies who had been referred to and continued:] That leaves Mrs. M., the last of the women on the respondent's list. It is an undoubted fact that from 1945 onwards, and perhaps also in 1944, the petitioner did seek her company to quite a considerable extent; and it is obvious that a very real and warm friendship grew up between them which was more and more resented by the respondent. I have to consider whether, as has been urged on her behalf, that relationship, which fell short of adultery, can be said to amount to cruelty on the part of the petitioner towards her. On the other hand, I have to consider whether, as is put forward in favour of the petitioner, the fact that the petitioner sought the company of Mrs. M. at this time is not rather a symptom of the way in which he was being treated at home, and thus the strongest possible evidence of cruelty on the part of the wife.

[His Lordship then referred to the matter of the petitioner's alleged abuse and neglect of the respondent and continued:] There have been, undoubtedly, many quarrels between these parties, and an increasing number of quarrels as time went on; and the petitioner sought more and more of his relaxation outside the home. That is, of course, one of the matters about which the wife complains, but the question remains: how was it that these quarrels came to start, who was the one responsible, and was the petitioner's conduct in staying out at night evidence of conduct on his part constituting cruelty to his wife, or was it that he was being driven to it by the way in which she was treating him? That is a matter to which I will return when I attack what I think is the important question in this case, namely, what was the real disease and what were merely symptoms.

[His Lordship considered the evidence as to assaults and certain sexual perversions which the respondent had alleged in her answer and said that he could find nothing in the allegations of assault upon which he could possibly be justified in basing a finding of cruelty, nor could he find proof of the allegations of sexual perversions, which must be totally and entirely rejected. His Lordship continued :] I am therefore left with the respondent's complaints of neglect, abuse, bad language and nagging, and her complaint against Mrs. M. ; these complaints must be considered in relation to the husband's case, to which I will now turn.

The husband's case is, in the main, one of constant and perpetual nagging over a period of years ; but he does make certain subsidiary charges against his wife with which it may be convenient to deal first. He complains of four so-called threats of suicide as being in themselves evidence of cruelty. Those four incidents were two in relation to gas jets, one in the car, and one in a letter to a local doctor. I find the car incident and the two gas jet incidents to have been no more than play-acting on the part of the wife, and I do not think the husband ever took them for anything else. I do not think they caused him any real degree of disturbance or fright. Similarly in the case of the letter I am not at all satisfied that that was taken too seriously, or that it caused any serious distress, except in so far as it was distasteful to have matters like that mentioned to a fellow doctor ; but I do not think the husband was in the least perturbed. It seems to me that these play-acting incidents are themselves merely symptoms, and not in themselves anything approaching acts of cruelty. The other subsidiary charges which the husband makes are in relation to two alleged threats of physical violence, one with a table knife and the other in relation to garden shears. [His Lordship said that he was not very much impressed by either of these alleged threats of assault, and continued :] That leaves the main body of the husband's case for consideration, that is, his complaint of persistent nagging, which went on and on and on, year after year ; nagging which, according to him, covered the widest range of subjects. He says that he was nagged perpetually about his relations with other women. So far as that goes, the respondent was admittedly suspicious of his relations with other women following the incidents of 1935; but the nagging which the husband complains of got to the stage when every time he was a few minutes late for a meal, or a few minutes late coming back from his round of patients, he was subjected to an inquisition as to where he had been or whom he had been seeing. The respondent's own diary shows that she was in fact extremely suspicious of a number of ladies whom she named and whom I need not mention in my judgment, although they are recorded in the respondent's diary. These suspicions go back to the year 1935, and undoubtedly, in so far as the husband complains of them, he is complaining of something for which he was himself originally responsible.

But over and above all this complaining about other women, the husband says that he was perpetually nagged about other things. One of the things he most resented was that he was nagged by her about matters in relation to his practice. He says that she interfered in relation to the dispensers and created bad feeling there; that she was unreasonably opposed to his moving his surgery; and that there were repeated and terrible disputes in the last few months of the subsistence of the marriage over the surgery soap and towels, which sound quite trivial when ventilated in open court, but which undoubtedly led to a good deal of ill-feeling. The petitioner further complains that the respondent was rude to some of his patients and made disparaging remarks in the presence of his patients, and he says that in consequence of the respondent's behaviour to and before patients he incurred a certain loss of patients. [His Lordship found that there was no actual proof of such loss, and he also referred to trouble over a local pooling system which had led to the petitioner being dropped by the other doctors and left to carry on single-handed. His Lordship continued:] It is said on behalf of the wife that from the earliest stages when the petitioner set up in practice, the respondent attended to all the financial affairs, and virtually managed the business end of it; and in those circumstances it is said, and said with no little force, that many of these matters over which complaint is made are matters in which it was within the respondent's province as business manager to take an interest. There are various ways of taking an interest, and if you persist in pushing your views to the extent of nagging and nagging and nagging, then, even though it relates to something which is definitely your department, it would still doubtless remain nagging.

The third thing of which the husband complains in relation to his wife's nagging and criticism is that she would never leave him alone to his own hobbies and to amuse himself in his own way. During the early part of the marriage he wrote a book, and that, he said, provoked a storm of opposition; when he bought a typewriter in order to type out the script she not only took exception to the expense but also expressed herself forcibly about the noise the typewriter made. The same thing happened when he set out to write a play. The same thing happened when he came to join the Playgoers' Society and took an interest in private theatricals. The same thing happened when he took to painting, and the same thing happened when he took to plaster modelling. In that case the wife complained of the mess, and the petitioner rather agreed, and stopped his own hobby. The same thing happened in relation to the gramophone and in relation to the wireless. If he turned the wireless on he was accused of not wanting to talk to the respondent, and of making too much noise, and so on. If he was taking the wireless to pieces he was accused of playing with it. In short the petitioner says that complaints of that sort were made at anything he put his hand to in his leisure hours.

Lastly, he says that he was attracted to the idea of becoming a mason, but that the opposition which the respondent brought to that proposal was such that he did not persist with it. The wife in evidence says that so far from opposing it she encouraged it, and was delighted with the idea that her husband should be a mason. All I can say is that I do not believe the respondent's evidence on that point. I accept the evidence of the petitioner that he did not become a mason only because of the respondent's opposition to the proposal.

Now, whether or not conduct of that sort was such as was fairly calculated to cause injury to the husband, and whether, if so, it was conduct fairly calculated to drive him to some of the things which he is alleged to have done, as, for instance, to associate unduly with Mrs. M. to the exclusion of his wife, and to seek relaxation elsewhere, is in the end the main matter for my consideration. It seems to me that much depends on the personalities of the two parties. I have already indicated that as between these two it was in my judgment the wife who had the dominating personality. In fact we find in her diaries, again and again, complaints that her husband was weak, that he allowed himself to be fooled and bamboozled by other people. It is perhaps interesting to observe that on several occasions the husband was driven on his wife's insistence into taking action which I simply cannot believe he would have taken on his own initiative.

Lastly, as has been pointed out by his counsel, we find that on two occasions the petitioner was actively deceitful in relation to his management of the dispensary because he was afraid of what the respondent would say if she found out what he was doing. That seems to me to be the strongest possible evidence that she was the dominating partner, and that at any rate until towards the end, when he began to revolt, he was very much under her thumb.

The respondent had two very good weapons to use, and each assisted to put her in the strong position which she occupied. She could never forget that it was through her instrumentality, or that of her family, that the money was found on which the training of the petitioner and the starting of the practice was based, and I think she regarded the petitioner as being her debtor for all time in respect of that. Secondly, the petitioner had undoubtedly been guilty of most improper conduct in relation to his flirtations with the two ladies in 1935, and the respondent was never able to forget it or to let him forget it. It was largely those two things, apart from her dominating personality, which gave the respondent such a hold over the petitioner, and enabled her on the various occasions to which I have referred, and possibly on many other unrecorded ones as well, to drive him into taking action against his better judgment, actions which he would not have taken but for the insistence of the respondent.

I have got to consider what the impact of such a personality in such a position is likely to be upon the mind of a busy doctor carrying on a one-man practice, and a very large practice at that, particularly in war-time, because it will be remembered that most of the events in this case took place during war-time or during the difficult period immediately succeeding the war. So far as that is concerned, I think I must come to the conclusion that the real trouble throughout, ever since 1935, has been due to the respondent's persistent nagging, criticism and abuse of the petitioner, kept up night and day, day after day and month after month, until finally it led to an open breach in the year 1946. Before that breach it did undoubtedly drive the petitioner to do things which he would never otherwise have done. It is to that that I attribute the petitioner's disposition during the last year or so of cohabitation to seek relaxation elsewhere, and it is to that that I attribute his association with Mrs. M., of which the respondent complains; and it is to that that I attribute his tendency to fly off into a temper when she criticized him. All those things to my mind are mere symptoms of the trouble. The real trouble was the wife's persistence in her suspicions, criticism, and so forth, maintained over many, many years.

But merely to find that a wife's nagging talk caused matrimonial unhappiness is not by any means sufficient to conclude the case. First of all I have to be satisfied that it produced more than unhappiness; it must at least produce some injury to health or reasonable apprehension of injury to health. As to that, I am abundantly satisfied. I have the evidence of Dr. Allen as to the nervous condition of the petitioner when he saw him in November, 1945. I have the evidence of friends and acquaintances in Boston, including a fellow doctor; and, best of all, I have the evidence of the respondent herself, who herself noticed the degeneration of her husband's health and noted it in her diary. I have not the least hesitation in coming to the conclusion that the petitioner's health was being undermined in consequence of the matrimonial unhappiness to which he was subjected. He never did in fact break down, and, as has been pointed out by counsel for the wife, so far as the evidence goes he never lost a day's work through any ill-health. But his health was being undermined, and I accept the evidence of Dr. Allen, that if matters had been allowed to proceed very much longer the probability is that he would have had a complete nervous breakdown.

So it seems to me that that element in a case founded upon cruelty (and it is necessary in any case founded on cruelty) is abundantly evident in this case. But having said that, I must ask myself the question whether all this nagging and suspicion which the husband sustained was justified, in whole or in part, by the husband's own fault in relation to what he did in 1935. I have done my best to make it clear that I do view the events of 1935 as serious matters, not to be lightheartedly waved off in the way that I think the petitioner wished me to do. They are serious matters; but as against that I am impressed by the fact that they were dead matters, respectably buried in 1935, and never dug up again except in the wife's conversation; and there was no evidence of the husband ever breaking his word that he would have nothing more to do with these ladies; there was nothing to show that the doctor was behaving in the least improperly with any other woman for a number of years after 1935. In those circumstances it appears to me that although at the outset no doubt the wife's suspicions were justified, and she had good cause for watching what her husband was doing, her persistence in nagging him about the matter went far beyond what was forgivable under the circumstances.

I find, therefore, that the wife's persistent nagging and querulous conduct with her husband was very far from being justified by that which he had done. I then ask myself the further question: could the wife help it? I do not think this is the time or place to make any detailed exposition of the law, which I think is reasonably clear so far as it applies to this case. It is clear that this court cannot give relief merely on the ground of matrimonial unhappiness. It is clear that there must be something in the nature of wilful and unjustified interference by one spouse in the sphere of life of the other spouse. That was made quite clear by Bucknill J., as he then was, in *Horton* v. *Horton* (1) and it is noticeable that in that case the learned judge referred to physical acts of the kind which show malevolence as being far more serious than mere nagging, abusiveness and jealousy. That is a thing which I must bear in mind, because in this case, as I have stated the facts, there is really nothing but nagging, abusiveness and jealousy. It is, however, established that mere nagging, abusiveness and jealousy can in certain cases amount in themselves to such an interference in the life of the other spouse as to justify this court in coming to the conclusion that they constitute cruelty. An illustration of that is to be found in *Atkins* v. *Atkins* (2), in which Henn Collins J. likened the process of nagging maintained over a period of years to the effect of water dropping on a stone.

There is, I think, one other point with which I must deal—a point which was brought to my notice in argument this morning. It was pointed out to me that in order to found a charge of cruelty it is not necessary that the spouse who is charged should be knowingly cruel; it is sufficient if he or she is intentionally guilty of acts which are in fact cruel in their result. That of course is in accordance with the doctrine that everybody is deemed to intend the natural consequences of his

---

(1) [1940] P. 187.

(2) [1942] 2 All E. R. 637.

1948

USMAR
v.
USMAR.

Willmer J.

or her own act. In this case I need only refer to the entries in the respondent's own diary, which time and time again show that when she refrains from criticism of her husband all is peace and they are quite happy. That shows that when she wanted she could perfectly well refrain from her habits of nagging. I have no doubt, therefore, that the wife could perfectly well have avoided the consequences which in fact took place if she had wished to do so. It may very well be that she was blissfully unconscious of the disastrous extent to which her conduct was undermining the marriage. I think that one of the truest answers that she herself gave me was when she said that a querulous and nagging wife was probably the last person in the world to realize what she was doing ; it may be that the wife did not realize what she was doing. But I think that there is no doubt that she did intend to criticize this man, and that that criticism did in the course of time amount to a constant course of nagging. I must treat it therefore as a course of conduct consciously and intentionally pursued.

In those circumstances it seems to me that all the necessary elements to constitute a case of cruelty have been made out, and that the petitioner in this case is entitled to a decree based upon that ground ; and for the same reasons it seems to me that what is alleged by the respondent does not amount to cruelty in the circumstances, because at the most what are alleged against the petitioner as acts of cruelty amount to nothing more in my judgment than his natural reaction against the treatment to which he was himself being subjected. The real cause of the trouble in my judgment in this case was the wife's cruelty, and there must be a decree accordingly.

Solicitors : *Roythorne, Hammond & Turner, Spalding ; Theodore Goddard & Co., for Dyer, Marris & Frost, Boston.*

J. B. G.

Varied. H.L. [1950] 2 All E.R. 414.

C. A.

1948

Apr. 6, 7, 8, 9, 12, 13, 14, 15, 16 ; *May* 27 ; *July* 9.

Scott, Bucknill and Asquith L.JJ.

OWNERS OF THE STEAMSHIP TOWERFIELD *v.* WORKINGTON HARBOUR AND DOCK BOARD.

THE TOWERFIELD.

Reversed. [1951] A. C. 112

Shipping—Ship—Stranding—Narrow channel approach to dock—Port facilities advertised by harbour authority—Inset plan published on Admiralty coastal chart—Warranty to maintain depth and area of navigable channel by dredging—Obstruction caused by silt—Negligence of harbour authority—Failure to warn pilot and shipowner—Local *knowledge of compulsory pilot—Liability of harbour authority in tort and in contract—Harbours Docks and Piers Clauses Act*, 1847 (10 & 11 *Vict.*, *c.* 27), *s.* 74—*Pilotage Act*, 1913 (2 & 3 *Geo.* 5, *c.* 31), *s.* 15.

In 1933 the Workington Harbour Board caused to be published on the Admiralty chart for the Cumberland coast an inset plan of the port of Workington indicating the leading marks, the centre line of the dredged channel and the width and minimum depth at which the dredged channel was maintained. The channel required to be frequently sounded and continuously dredged to clear away silt brought down by the River Derwent. On October 19, 1941, the steamship *Towerfield*, laden with manganese ore, and drawing 23 feet forward, and 24 feet aft, arrived off the port after arrangements made between the Government charterers and the Harbour Board, and was boarded by the Trinity House compulsory pilot to navigate the ship into the Prince of Wales dock. Before the pilot began to move the vessel he received a message from the harbour master informing him that the tug, which customarily attended on ships to assist them entering, was not then available, owing to recently developed boiler defects. After discussing the question of entering on that tide with the master, the pilot expressed his confidence that he could bring the ship in safely and the master decided to enter. The master had seen the chart with the plan but admitted in evidence that he relied on the pilot's local knowledge and long experience of the port; the pilot had little (if any) knowledge of the chart. He relied entirely on his own knowledge, personal observation, and such information freely given, as could be obtained in conversations with the harbour master relating to the encroachment of silt. Just after high water the *Towerfield* proceeded inwards, and when about 400 yards up the narrow dredged channel, she grounded on an obstruction on the north side and remained immovable. When the tide ebbed she broke her back and temporarily became an obstruction to the navigation of the port. On a claim for damages by the owners of the *Towerfield* against the Harbour Board, and on a counterclaim for dmages by the Harbour Board against the owners of the *Towerfield* under the Harbours, Docks, and Piers, Clauses Act, 1947, s. 74, Willmer J. found that though the Harbour Board had negligently failed in their duty to maintain the advertised width and depth of the channel, the grounding of the ship and consequent damage were solely due to the negligence of the pilot for which the owners of the *Towerfield* were liable. He accordingly dismissed the plaintiffs' claim and gave judgment in favour of the defendant Harbour Board on their counterclaim. On appeal:

Held per totam curiam that the counterclaim of the Harbour Board failed and (per SCOTT and ASQUITH L.JJ., BUCKNILL L.J. dissenting) that the claim of the shipowner succeeded.

Per SCOTT and ASQUITH L.JJ.: (1.) that the Harbour Board was precluded from alleging that the grounding of the *Towerfield* was caused by bad seamanship and negligence on the part of the pilot,

C. A.

1948

OWNERS OF THE STEAMSHIP TOWERFIELD v. WORKINGTON HARBOUR AND DOCK BOARD.

THE TOWERFIELD

as found at the trial, by the Board's own failure and grave negligence in regard to their common law and statutory duty (*a*) to dredge continuously in order to keep the port open to navigation; (*b*) to inform themselves about the state of the channel; and (*c*) to warn with regard thereto shipowners and, above all, pilots. Even if the pilot were negligent in taking the course which he did take, it could not have been the sole cause of the stranding because the negligence of the Board was such that it continued up to the very moment of the casualty.

(2.) that the published information of the port's facilities was a standing invitation to shipowners by the Harbour Board to use their dock and constituted an offer to all whom it might concern of the navigational facilities as described in the inset plan with a channel to be permanently maintained by dredging to the stated depth, subject to relief from their absolute warranty by (*a*) timely notice by the Board to an intending entrant ship of some obstruction in the channel; (*b*) in the case of some obstruction, by the giving of all reasonable requisite information so as to enable a vessel intending to enter to do so safely. On the part of the shipowner there was an implied promise by him that his ship would be navigated with all reasonable care and skill.

(3.) that on the true construction of s. 15 of the Pilotage Act, 1913, having regard to its historical origin, the scope and object of the statute was the abolition of compulsory pilotage as a defence to a claim for damages whether by one ship against another ship or by a harbour authority against a ship and was strictly limited to actions in tort without justification for extending it to actions of contract. In so far as the erroneous navigation of the pilot in the present case was caused by the Harbour Board's own failure of duty, whether at common law or by reason of their contract with the shipowner to give him essential information, the Board were precluded from relying on his error as constituting negligence either on his own part or on the part of the shipowner, even though s. 15 of the Pilotage Act required the court to regard the relationship between the two as that of master and servant. In the result, therefore, the shipowners would succeed on their claim in contract and on their claim in tort; the Harbour Board would fail on their counterclaim as on their plea of contributory negligence.

Per BUCKNILL L.J.: (1.) The evidence established that the stranding of the *Towerfield* and damage were partly caused by the negligent navigation of the ship by her compulsory pilot and partly by the negligence and breach of duty of the Harbour Board. On the true construction of s. 15 of the Pilotage Act, 1913, the compulsory pilot was the agent of the shipowner in connexion with a claim by the shipowner as well as a claim by a third party against him as by the doctrine of respondeat superior he would have been at common law. The plaintiffs' claim, so far as it was based on tort, should therefore fail because it was completely barred by their own contributory negligence.

(2.) It was not reasonable to assume that the statement made in 1933 by the Harbour Board as to the state of the channel could be taken as a warranty in 1941 that the same state persisted then, particularly having regard to the restrictions in dredging, maintenance and repair imposed by reason of war conditions. If there were a warranty to be implied in any contract made between the shipowner and the Harbour Board regarding the use of the harbour on October 19, 1941, there was also an implied term that those in charge of the ship would navigate her with reasonable care and skill and that they would obey by-law No. 9 of the Port By-Laws. The *Towerfield* grounded because she was not so navigated and such breach of the implied term directly contributed to the stranding and seemed to preclude the shipowner from recovering damages for breach of warranty, if any.

(3.) The counterclaim of the Harbour Board under s. 47 of the Harbours, Docks and Piers Clauses Act, 1847, should also fail by reason of the common law rule that nobody could take advantage of the wrong for which he himself was solely or partly responsible, and that rule should be applicable where a claim was made under the section.

APPEAL from the decision of Willmer J.

The plaintiffs, the owners of the steamship *Towerfield*, sued the Workington Harbour Board for damage to their ship which grounded while proceeding up the channel from the sea to the Prince of Wales dock in Workington Harbour when the harbour was also damaged by the grounding. The Harbour Board counterclaimed for damage to their harbour. The plaintiffs' claim was based on: (1.) a breach of the defendants' duty imposed on them by their statutes and at common law to take reasonable precautions that the approaches to the port and harbour were safe for the *Towerfield* to navigate, or to give warning that no such care had been exercised; (2.) a breach of contract or warranty by the defendants that the condition of their harbour was in accordance with a statement and plan inserted, at their request, on the appropriate Admiralty chart from 1933 onwards.

The defendants based their counterclaim on the alleged negligence of those in charge of the *Towerfield* in causing the ship to become stranded, and also under the Harbours, Docks and Piers Clauses Act, 1847, s. 74 (1).

---

(1) The Harbours, Docks and Piers Clauses Act, 1847, s. 74: "The owner of every vessel " . . . . shall be answerable to the " undertakers for any damage " done by such vessel . . . . or " by any person employed about " the same, to the harbour dock " or pier . . . . and the master or " person having the charge of

C. A.
1948

OWNERS OF THE STEAMSHIP TOWERFIELD
v.
WORKINGTON HARBOUR AND DOCK BOARD.
THE TOWERFIELD

On the morning of October 19, 1941, the *Towerfield*, a steamship of 4,241 tons gross, 373 feet in length and a beam of 52·4 feet, anchored outside the port laden with a cargo of manganese ore, drawing 23 feet forward and 24 feet aft, and was boarded by a Trinity House pilot. Pilotage in the harbour was compulsory for the *Towerfield*. The steamship *Ashbury* had safely entered about half an hour before the *Towerfield*. She had a slightly lesser draft but both vessels, making allowance for the slight increase, owing to the tide, would have the same depth under their respective keels.

The judge at the trial decided that the pilot, with the information which he had, or should have had, at his disposal of an obstruction on the north side of the channel was guilty of a want of reasonable care in deliberately ignoring the lead afforded by the leading marks and in navigating the ship so far to the northward, and that by following the line of the leading marks, could have entered in perfect safety and without difficulty. He came to the conclusion that the pilot's negligence was the sole cause of the stranding. He dismissed the shipowners' claim and gave judgment to the Harbour Board on their counterclaim.

The plaintiffs appealed.

K. S. Carpmael K.C., *J. V. Naisby K.C.* and *G. N. W. Boyes*, for the plaintiffs: In the court below the case was decided on the grounds that the ship was in charge of a compulsory pilot who was solely to blame for the stranding of the ship because he knew or ought to have known that there was an obstruction on the north side of the channel. It was difficult to understand why the pilot should be found negligent for navigating on the north side. It was said that those in charge

---

"such vessel . . . . through whose "wilful act or negligence any "such damage is done shall also "be liable to make good the "same . . . . Provided always, "that nothing herein contained "shall extend to impose any "liability for any such damage "upon the owner of any vessel "where such vessel shall at the "time when such damage is "caused be in charge of a duly "licensed pilot, whom such owner "or master is bound by law to "employ and put his vessel in "charge of."

The Pilotage Act, 1913, s. 15: "Notwithstanding anything in "any public or local Act the "owner or master of a vessel "navigating under circumstances "in which pilotage is compulsory "shall be answerable for any loss "or damage caused by the vessel "or by any fault of the navigation "of the vessel in the same manner "as he would be if pilotage were "not compulsory."

had allowed the ship to be blown outside the channel. The judge also found that the Harbour Board negligently failed to maintain the channel by dredging, etc., to the depth stated in the published information and on the inset plan. The question of contributory negligence would therefore be for the consideration of this court.

[Scott L.J. Your case is that the Harbour Authority ought not to have invited the ship to enter their port knowing as they did that the width of the channel and the depth of water was never accurately maintained. Either the Harbour Board knew and did not warn or they were ignorant of the true state and could not have accurately informed the pilot had he sought the information from them. What are the duties of a pilot in such a case as the present to make personal investigation where feasible to ascertain any visual changes in the width of the channel and the depth of water ?]

In answer, counsel referred to *The Bearn* (1). There is an overriding duty on the dock authorities to warn of an obstruction in the channel.

[Bucknill L.J. : The Minister of War Transport telephoned the dock authorities that they were sending the *Towerfield*. Was it then the duty of the dock authorities to say that they could not receive her because of her draft ?]

Yes. It is said that the pilot failed to make use of his opportunities to ascertain the condition of the channel. For the defendant Harbour Board to succeed they must get a finding that the pilot *knew* ; that he *might* have known is not sufficient to entitle them to judgment. The pilot is in the same position as the owner or master ; all are entitled to reasonable care on the part of the Harbour Authorities and warnings of obstructions. It was a physical impossibility to navigate the *Towerfield* in the centre of the channel as required by No. 9 of the Harbour Board's by-laws.

[Scott L.J. At common law a pilot would be an independent contractor.]

No. He would be the servant of the ship. A shipowner takes a compulsory pilot as he finds him. Section 15 of the Pilotage Act, 1913, has to be construed strictly. The shipowner ought not to be held liable for the failure of the pilot to acquire local knowledge ; it puts on the shipowner the liability for any damage caused by the pilot failing to have the knowledge that he could have had. *The Bearn* (1) decided

(1) [1906] P. 48.

that the Harbour Authority cannot slough off on to the pilot their responsibility for failure to warn. *The Moorcock* (1) referred to. There was no standard of negligence respecting the duties of a pilot; one has to take into consideration all the circumstances in each case. The doctrine of volenti non fit injuria would apply if he took the risk of entering with knowledge of all the risks and it would be on his own responsibility. He ought not to be convicted of negligence for bringing in the *Towerfield* in the way he did and for the grounding, in view of all the facts disclosed by the sounding plans and the dredging operations.

With regard to the counterclaim. That rests on the Harbours, Docks and Piers Clauses Act, 1847, s. 74. If there was no negligence anywhere the defendants would be entitled to recover from the shipowner in the circumstances of this case. (See the interpretation in *The Mostyn* by the House of Lords (2).) That ought not to be the position here. The Harbour Board have been thoroughly negligent; it was the cause of this casualty. If not, it was the causa sine qua non. The question of contributory negligence is of importance here. Counsel referred to the case of *Det Forenede Dampskibs Selskab* v. *Barry Railway Co.* (3); *Adamson* v. *Wear Commissioners* (4); *The Maria* (5).

The *Towerfield* was properly using the public navigable highway and was entitled to be anywhere within the highway. It does not matter whether there is a by-law (such as is relied on by the defendants) to keep in the centre of the channel or on the south of it. The harbour authorities have a duty to keep the harbour free from obstruction or to warn. The judge has not found that the ship ought to have come up in centre of the channel; he said that it should have come up on the line of the leading marks. It would have been negligent for any pilot with local knowledge to have been anywhere near the centre of the dredged channel. The master was also entitled to a warning. He would naturally conclude that the ship was proceeding along the dredged channel and would not feel justified in interfering with the pilot.

[SCOTT L.J. When the War Ministry informed the Harbour Board that they were sending the ship to Workington, it was implicit in their order that they were sending her " if you can " receive her."]

(1) (1888) 13 P. D. 157.
(2) [1928] A. C. 57.
(3) (1919) 1 Ll. L. Rep. 658.
(4) (1877) 2 App. Cas. 743.
(5) (1839) 1 W. Rob. 95, 108.

Compulsory pilotage having been abolished, the position is now the same as it was at common law. It is clear that this was a poor harbour made more difficult by the negligence of the Harbour Board.

R. F. Hayward K.C., *P. Devlin K.C.* and *C. Fletcher Cooke* for the defendants: The judge was not only justified in finding what he did but his findings and conclusions were well-founded. The defendants admit that the chart was misleading but it did not mislead; the pilot never had a chart or looked at it or acted on it. The judge was wrong in finding that the Harbour Board did not take reasonable care and his conclusions on that question are wrong in law. His findings, however, do not lead to a breach of duty once duty is properly defined. If there was negligence by the Harbour Board it was not causative; the public information was not relied on. The principle in *Bowmakers, Ld.* v. *Barnet Instruments, Ld.* (1) was applicable here.

[Bucknill L.J.: The master looked at the chart and said it looked safe enough.]

The master was not navigating the ship. With regard to contractual knowledge, the degree is the same as, in the case of tort, where the doctine of volenti non fit injuria is applicable. The invitor may make the premises reasonably safe or may warn the invitee that they are not safe. (*Indermaur* v. *Dames* (2); *Francis* v. *Cockrell* (3) referred to.) The contract must be considered with its limitations. It may not refer to the whole of the premises as in the case of an invitee who is permitted to use a staircase in a reasonable way; he may walk up it but not run or jump up it. The chart was no more than an offer to the public but if a shipowner decided to go to the port that, in itself, would not be an acceptance of the offer for the breach of which, such as the finding of the port closed, the shipowner could sue the harbour authority for damages. The publication must be contractually intended. Whether the chart, issued at some indefinite time ago, was a contractual document is a question of fact.

The whole thing is, at the most, no more than a representation to induce a contract to be entered into (*Heilbut Symons & Co.* v. *Buckleton* (4) referred to.) A harbour authority is not

---

(1) [1945] K. B. 65.
(2) (1866) L. R. 1 C. P. 274.
(3) (1870) L. R. 5 Q. B. 501.
(4) [1913] A. C. 30.

C. A.

1948

OWNERS OF THE STEAMSHIP TOWERFIELD *v.* WORKINGTON HARBOUR AND DOCK BOARD.

THE TOWERFIELD

likely to pledge itself as to the depth of water susceptible to fluctuations as it may change at any moment. The ordinary contract was that the Harbour Board would supply a reasonably safe approach into the dock. If a ship selects an unsafe way of approach it cannot be said that there has been a breach of warranty of space and depth. It was never intended as a warranty. There was no obligation to maintain the dock or the channel; our works were only permissive, there was no statutory compulsion. The intervention of the pilot with his local knowledge diminishes or cuts down the representation contained in the inset chart. The crucial position here is that the pilot admittedly did not come up the way he meant to. Can it be expected by the defendants that the pilot would be at a point where he did not expect to be himself.

Other cases referred to were: *Walker* v. *Midland Ry. Co.* (1); *Gordon* v. *Metropolitan Police Commr.* (2); *The Mostyn* (3); *Norman* v. *Great Western Ry. Co.* (4); *Mersey Docks & Harbour Board* v. *Procter* (5).

Carpmael K.C. in reply.

Cur. adv. vult.

July 9. SCOTT L.J.: I will ask BUCKNILL L.J. to read the first judgment.

BUCKNILL L.J., after stating the preliminary facts and reviewing the evidence of the pilot, continued: The ship stranded because the pilot was deliberately bringing her up the channel in a position in which there was insufficient water for her. The crucial question is whether he in doing this showed a lack of such care and skill as may be reasonably expected of a licensed Trinity House pilot.

The pilot did not rely on the north dredging marks to tell him where the ship was with reference to the edge of the dredged channel; his evidence was that on the morning of October 19, 1941 (the day of the stranding), he could not make out these marks because of factory smoke, and he was not navigating by them.

(His Lordship then referred to certain questions of seamanship put by the Court to the Assessors and their answers.)

(1) (1886) 55 L. T. 489.
(2) [1910] 2 K. B. 1080.
(3) [1927] P. 25.
(4) [1915] 1 K. B. 584.
(5) [1923] A. C. 253.

I accept this evidence of our assessors and agree with the conclusion of the learned judge that Craig was negligent in his pilotage of the *Towerfield*. In my opinion the stranding and damage were partly caused by such negligence.

The question then arises whether pilot Craig's negligence bars the claim of the shipowners against the defendants in respect of their breach of duty, even if they are able to establish that the defendants partly caused the stranding by breach of duty and negligence on their part. I therefore now proceed to consider whether there was such breach of duty and negligence. The learned judge on this part of the case decided that the plaintiffs proved a want of reasonable care on the part of the harbour authority in failing to maintain the width and depth of the channel advertised (thereby rendering the published information misleading) in failing to ascertain by properly carried out and regular soundings what obstructions existed in the channel and exactly where and in failing adequately to warn the users of the port of the dangers of which, as harbour authority, they knew or ought to have known.

Mr. Hayward on behalf of the defendants said that he did not accept these conclusions, but no argument was put before us to show that they were wrong. I agree with the judge's conclusions on the point for the reasons which he gives. In addition to these conclusions of the learned judge I think that the defendants also were guilty of a breach of duty in that they failed to warn the owners of the ship or their agents (including the pilot Craig), that they had taken no proper steps by sounding since September 22 to ascertain what the state of the channel was and what obstructions, if any, were in it, and that the dredger had not been at work on the north side of the channel since October 9.

The judge decided that Craig with the information which he had or should have had at his disposal of the obstruction in the north side of the channel was guilty of a want of reasonable care in deliberately ignoring the lead afforded by the leading marks and in navigating his ship so far to the northward. The judge also decided that the *Towerfield*, by following the line of the leading marks, could have entered in perfect safety and without difficulty. The judge on these findings came to the conclusion that Craig's negligence was the sole cause of the stranding.

In support of this final conclusion, Mr. Devlin on behalf of the defendants argued that they had not contracted to provide a dredged channel 250 feet wide, and that all that the law required of them was that they should provide a reasonably safe approach to the Prince of Wales Dock. He relied on s. 19 of the Workington Harbour and Dock Act, 1905, which was permissive and not mandatory and enacted that the Board may dredge deepen preserve and improve the said harbour and the channels and approaches thereto. He argued that, although the judge's findings as to the want of care on the part of the defendants may have been justified, nevertheless there was a reasonably safe approach to the dock to pilot Craig's knowledge, namely the line of the leading marks, that Craig knew of the obstructions on the south and north side of the channel and therefore that there was no need to warn him, except as to unexpected danger or dangers of which the pilot did not know or could not have known by the exercise of reasonable care. There was a clear duty on Craig to take care himself to avoid dangers of which he knew or ought to have known. In support of this argument Mr. Devlin relied on some dicta in *Norman* v. *Great Western Ry.* (1), and especially on those of Phillimore L.J., where he pointed out that the question in the case where a railway company is sued for injuries to person or property sustained on their premises is whether the premises were reasonably safe. Phillimore L.J. said: "In analysing the expression 'reasonably safe' one "must take into account what is called in modern parlance "the personal equation; what may not be safe for one person "may be safe enough for the persons who frequent particular "business premises." Applying this principle to the present case Mr. Devlin argued that the channel was safe for the *Towerfield* because Craig knew all about the obstructions in the channel and could have come in quite safely on the line of the leading marks. As the learned judge said in his judgment: "The *Towerfield* was in charge of a highly experienced "pilot, a man whose knowledge of the port went back "forty years and who probably knew more about it and about "the dangers to be avoided in navigating it, than anybody in "the defendants' employment."

In my opinion it was the duty of the defendants to call the attention of those in charge of the *Towerfield* to certain matters which were within their special knowledge and which gravely increased the risk to the *Towerfield* when navigating their harbour. These matters are: (1.) Their failure to take any soundings in the channel since September 22. (2.) The fact that the dredger had done no work on the north side of the channel since October 9. (3.) The fact that the channel navigable for the *Towerfield* on October 19 was only 155 feet wide.

---

(1) [1915] 1 K. B. 584, 595.

The judge has found that the defendants' sounding plans were not exhibited for the pilots to see, although the harbour master in his statement said that he always informed the pilots as to the results of his soundings and produced his sounding charts to them at his conference with them, usually in the pilots' cabin. There is no evidence as to when or by whom Craig was told that the *Towerfield* would be coming to Workington or what her approximate draught would be, or that the *Ashbury* would be docking on the same tide. Craig lived at Maryport. There is no evidence as to how often he was piloting ships at Workington in the last few weeks before October 19, but we know he was there on October 6, 7 and 17, and he had a look at the channel at low water on those days from the south side. In my opinion the breach of duty of the defendants in failing to inform those in charge of the *Towerfield* (and I include Craig amongst them) of these matters concerning the navigation of the channel on the 19th contributed to the stranding of the *Towerfield*.

The principles laid down by the Court of Appeal in *The Eurymedon*, which were referred to with approval by Lord Simon in his speech in the House of Lords in the *Boy Andrew* v. *St. Rognvald* (1), seem to me to support this conclusion. If one applies the propositions stated by Greer L.J. in that case, it seems to me that the breach of duty of the defendants in this case, of which the judge has rightly found them guilty, continued right up to the moment of stranding. Moreover I think the breach of duty of the defendants in allowing a large bank to accumulate in the southern part of the dredged channel contributed to the negligent mistake of the pilot in navigating too far to the northward of the leading marks. The fear of grounding on this obstruction partly led Craig away from his proper course up channel. I do not agree with the statement of the learned judge that the *Towerfield* could have entered the harbour without difficulty and in perfect safety if she had followed the line of the leading marks, and accept the answer of our assessors on that point. The case would be different if Craig had seen the bank on which he grounded when he was approaching it and could without difficulty have avoided it. At the time of the stranding Craig could not see the bank and did not know its precise area or height, but his local knowledge should have warned him of its probable presence and should have warned him to keep near the line of the leading marks and to give the Bush Perch a wider berth than he did. If he had received the warning and information with which I think the defendants were under a duty to supply him, he would probably have been careful to do so.

---

(1) [1948] A. C. 140, 150.

So far as the plaintiffs' claim in tort is concerned, the position therefore is that the damage to the ship was partly caused by the negligent navigation of the ship by her compulsory pilot and was partly caused by the negligence and breach of duty of the defendants. If Craig is to be considered as a voluntary pilot and as agent of the shipowner whilst in charge of the navigation of the ship, when the shipowner is not only resisting but also when making a claim, then in 1941 the claim of the plaintiffs would fail at common law, on the ground of Craig's contributory negligence. But here the difficult question arises whether Craig was the agent of the shipowner by virtue of s. 15 of the Pilotage Act, 1913, in connexion with a claim by the shipowner as well as against him, or whether that Act merely imposes a liability on the shipowner for damage caused by the negligent navigation of the ship and leaves him in the same position as he was before the Act was passed so far as claims made by him for breach of duty or contract by a third party are concerned.

The words of the section by imposing on the shipowner a liability for the negligence of a pilot whom he is bound to employ, departed from the principle of the common law, and it may be urged with some force that its application should not be extended beyond the strict interpretation of its terms. The word " answerable " may be said to indicate that the section is dealing with a claim which has to be answered, and that the general tenor of the words indicates a claim by a third party for injury sustained by him through the faulty navigation of the vessel whilst in charge of a compulsory pilot. One of the objects of the section was to get rid of compulsory pilotage as a defence in order to bring the law of England into line with the laws of other nations. Section 15, sub-s. 2 of the Pilotage Act enacts that the section shall not take effect until January 1, 1918, or such earlier date as His Majesty may fix by Order in Council certifying that it is necessary to bring the section into operation in order to enable His Majesty to comply with an international convention. The convention therein referred to is the International Convention for the unification of certain rules of law respecting collisions signed at Brussels, September 23, 1910. Article 5 of that convention provided that: "the liability imposed by the preceding "Articles attaches in cases where the collision is caused by the "fault of a pilot, even when the pilot is carried by compulsion "of law." (See Digby & Cole's Pilotage Law (1913), App. II., p. 86.) It will be noted that the word used in the convention is "liable" not "answerable." The use of the word "answerable" in sub-s. 1 of s. 15 is probably explained by reference to sub-s. 3 of the section which is in the following terms: "As from the date of the coming into operation of "this section, s. 633 of the Merchant Shipping Act, 1894, "shall cease to have effect." That section declared that an owner should not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of a compulsory pilot. In other words, s. 15, sub-s. 1, was intended to repeal the law as stated in s. 633 of the Merchant Shipping Act, 1894.

So far as I know it has never been argued either in the Admiralty Court or in the Commercial Court during the thirty years that have passed since 1918 that the object of s. 15 was not to get rid of compulsory pilotage altogether as a defence; in other words it has always been assumed that s. 15, sub-s. 1, put on the shipowner the same responsibility for the acts of a compulsory pilot as he has always had for the acts of a voluntary pilot, "namely a contractual relation of service, "to which the maxim of respondeat superior directly applies" as Lord Atkinson said in his speech in *The Beechgrove* (1).

This question before us turns on the meaning of the words of s. 15, sub-s. 1, and having regard to the fact that those words are apparently taken from s. 633 of the Merchant Shipping Act, 1894, it is, I think, permissible to see what interpretation has been put on the words of s. 633. In *The Adam W. Spies* (2), the owner of a ship made a claim against the owner of the tug towing the ship for damage caused to the ship by the tug's negligence. Jeune P., held that the damage was partly caused by the tug's negligence and partly

(1) [1916] 1 A. C. 364, 383.

(2) (1901) 70 L. J. (P.) 25.

C. A.
1948
OWNERS OF THE STEAMSHIP TOWERFIELD *v.* WORKINGTON HARBOUR AND DOCK BOARD.
THE TOWERFIELD
Bucknill L.J.

by the negligence of the pilot in charge of the tow who, the owners of the tow asserted, was a compulsory pilot, and expressed the view that if the pilot was a compulsory pilot, the owners of the tow could recover all their damage from the tug owner on the ground that the owners of the ship would not be affected by the contributory negligence of the pilot. He said : " I have no doubt that if it can be shown that the " contributory negligence alleged was the negligence of the " compulsory pilot, then that would be an answer on the part " of the owners of the ship, and that they would not be " affected by that contributory negligence, but would, notwith-" standing it, be able to make good their claim for the " negligence of the tug . . . . It is true as has been pointed " out by counsel for the plaintiffs that the wording of s. 633 " (of the Merchant Shipping Act) points rather to a defence " to an action brought against the ship for damages than to " an answer to a defence of contributory negligence, but the " words appear to me to be sufficiently broad to cover both " cases. If the owner or master of a ship is not answerable " to any person whatever for any loss or damage sustained by " the fault of the compulsory pilot, then he cannot be " answerable whether the question arises as one of con-" tributory negligence or as a direct allegation of negligence " against the ship."

Section 633 of the Act of 1894 replaced and re-enacted s. 388 of the Merchant Shipping Act, 1854. That section is placed under a heading " Saving of Owners and Masters rights " and is as follows : " No owner or master of any ship shall be " answerable to any person whatever for any loss or damage " occasioned by the fault or incapacity of any qualified pilot " acting in charge of such ship within any district where the " employment of such pilot is compulsory by law."

In *The Hector* (1) a collision occurred between the *Hector* and the *Augustus* through the joint negligence of both ships. The *Hector* was in charge of a compulsory pilot. Brett M.R. in the course of his judgment said : " If s. 388 of 17 & 18 " Vict., c. 104 alone governed the law I should hold that the " *Hector* was entitled to succeed as to the whole. That is the " logical consequence." Here again these words seem to indicate that the words " answerable to any person what-" ever " included claims made by the owner of the ship which was in charge of a compulsory pilot.

(1) (1883) 8 P. D. 218.

The Act of 1854 replaced the Pilotage Act of 1825, s. 55 of which enacted that " no owner or master of any ship or vessel " shall be answerable for any loss or damage which shall " happen to any person or persons whomsoever from or by " reason or means of any neglect, default, incompetency or " incapacity of any licensed pilot acting in charge of any such " ship or vessel under or in pursuance of any of the provisions " of this Act, where and so long as such pilot shall be duly " qualified to have the charge of such ship or vessel, or where " and so long as no qualified pilot shall have offered to take " charge thereof."

In *The Maria* (1) a collision took place between the British vessel *Websters* and the Prussian vessel *Maria*. The owners of the *Websters* sued the *Maria*, who in her defence alleged that she was under the charge of a duly licensed pilot, taken on board under the provisions of the Newcastle Pilot Act, 41 Geo. 3, c. 86 (1802) s. 6 and that by virtue of that Act and also of the General Act, 6 Geo. 4, c. 125 (1825), s. 55, even if the damage had been occasioned by her the owners were not responsible. There was no counterclaim because the *Maria* also alleged that the collision was due to the negligence of a third ship. Dr. Lushington in the course of his judgment said : " Now the " leading principle of the legislature in exonerating owners " from any damage occasioned by their vessels having pilots " on board is this : that the masters are compellable to take " such pilots on board, and the owners are not responsible for " the acts of persons to whom they are thus forced to commit " the management of their property and over whom they have " no control. This I apprehend is a rule founded on a great " principle of justice and equity." Later on in the same judgment at p. 106, Dr. Lushington said : " I am of opinion, " that independently of the express provisions of these " statutes (52 Geo. 3, s. 30 and 6 Geo. 4, s. 55) the com- " pulsory taking of a pilot does upon general principles relieve " the owner from all responsibility for his acts . . . . Upon " general principle a man is answerable for the acts of his " servants, for injuries done by them to others within the " scope of their employment ; and why ? Because he selects " them, and the selection is voluntary. But if a man is " compelled to employ another the principle upon which " liability depends wholly fails," and later at p. 111 he says : " The opinion I have thus formed in this case is founded upon

---

(1) 1 W. Rob. 95.

C. A.
1948

OWNERS OF THE STEAMSHIP TOWERFIELD *v.* WORKINGTON HARBOUR AND DOCK BOARD.

THE TOWERFIELD

Bucknill L.J.

"the general principles of reason and justice, that no one "should be chargeable with the acts of another who is not an "agent of his own election and choice."

The judgment was approved by Lord Buckmaster in *The Beechgrove* (1) where he accepted as accurate the principle that "here the master is bound by Act of Parliament under "a penalty to place his ship in the charge of a pilot, and he "does so in compliance with the provisions of such Act, the "ship is not to be considered as under the management of "the owners or their servants."

The Act of 1825 replaced 52 Geo. 3, c. 39, s. 30 of which enacted that: "No owner or master of any ship or vessel "shall be answerable for any loss or damage, nor shall any "owner or owners of any ship or vessel or consignee of goods "be prevented from recovering any loss or damage upon any "contract of insurance of the same or upon any contract "relating to any ship or vessel or any cargo upon the same for "or by reason or means of any neglect, default incompetency "of any pilot taken on board of any such ship or vessel, under "or in pursuance of any of the provisions of this Act."

This Act continued: "With alterations and amendments" an Act of 48 Geo. 3, c. 104 passed in 1808 and to be in force for four years. That Act contained no reference to exemption of liability in respect of the acts of a compulsory pilot.

In *Carruthers* v. *Sydebotham* (2) the plaintiff was the owner of goods on board the *Alexander* and he insured them with the defendant against loss by stranding, unless caused by the misconduct of the master and mariners. Owing to the negligence of a pilot in charge of the ship the goods were damaged by stranding. It was contended for the defendant that the plaintiff could not recover because the pilot was the servant of the master. Judgment was given for the plaintiff and in the course of it Lord Ellenborough, at p. 85, said: "If the master cannot navigate without a pilot except under "a penalty, is he not under the compulsion of law to take "a pilot? And if so, is it just that he should be answerable "for the misconduct of a person whose appointment the "provisions of the law have taken out of his hands, placing the "ship in the hands and under the conduct of the pilot? The "consequence is, that there is no privity between them. In "general, if there be a damage arising from a marine peril, "unless that damage be induced by the act of the master or

---

(1) [1916] 1 A. C. 364, 379.

(2) (1815) 4 M. & S. 80.

" mariners, or owner of the ship, it is a damage within the " scope of the policy. Here has been a stranding which has " occasioned an average loss, for which the underwriter will be " responsible unless it has been occasioned by the party's own " act. And how can that be, unless the act of the pilot who is " imposed upon the master by law, is to be considered as his " act ? It appears to me therefore that the underwriter is " liable because this does not fall within the description of " a damage that has been caused by the act of the assured " themselves, but by the act of the pilot between whom and " the assured there was no privity."

Dr. Lushington in *The Maria* (1) commented on the similarity of the two sections in the Acts of 1812 and 1826 and did not refer to the fact that that part of the section in the Act of 1812 which dealt with claims for breach of contract had been omitted. This leads me to think that these words as to recovery of damage caused by a compulsory pilot were omitted in s. 55 of the Act of 1826, because they were regarded as unnecessary, in that the word " answerable " was intended to cover all claims both by and against persons in which the conduct of the compulsory pilot was a contributory cause of the damage.

Section 1, sub-s. 1 of the Maritime Conventions Act, 1911, enacts that, where by the fault of two or more vessels damage or loss is caused to one or more of those vessels to their cargoes or freight or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault. Where damage is caused to ship A. by the fault of ships A. and B. and the fault of A. is that of her compulsory pilot (as happened in *The Hector* (2)), it seems that this section intends the liability to make good the damage to A. to fall upon the owners of A. and the owners of B. in proportion to the degree in which each vessel was at fault. To hold that the owner of A. could recover the whole of his damage from the owner of B. because A. was in charge of a compulsory pilot seems to be inconsistent with the sub-section. It is true that sub-s. (*c*) of the proviso to the section states that nothing in the section shall be construed as imposing any liability from which he is exempted by any provision of law. Such an exemption from liability no doubt would arise in the case of compulsory pilotage before the Pilotage Act, s. 15, came into force. After the Pilotage Act was passed, it seems to me contrary to the object of the Maritime Conventions Act if the proviso to s. 1 is construed so as to entitle the shipowner to exemption from the burden of paying for part of the damage to his ship when his ship was partly to blame through the negligence of her compulsory pilot. The interpretation of s. 15 of the Pilotage Act, 1913, was considered in *Clark* v. *Hutchison* (1). In that case the First Division of the Inner House held that the compulsory pilot of the defendants' ship was the fellow servant of the chief engineer of that ship, and that the defendants were therefore not liable for the death of the chief engineer through the negligence of the compulsory pilot. The case does not touch directly on the point now under consideration, namely, whether "answerable" includes a claim made by the shipowner against a third party for damage, to which his compulsory pilot's negligence has contributed, but the Inner House did lay down the broad proposition that s. 15 made the compulsory pilot the servant of the shipowner. Lord President Clyde summed up the effect of the section at the conclusion of his judgment in the following words: "The "liability artificially made to rest on the owners must be taken "with all the legal qualifications attaching to it, and the "defence of collaboration is one of them." One of the "legal "qualifications," is surely the responsibility for the contributory negligence of the pilot when it has partly caused the damage sued for.

---

(1) 1 W. Rob. 95.

(2) 8 P. D. 218.

In my opinion therefore the plaintiffs' claim fails, so far as it is based in tort against the defendants, on the ground that the stranding of the ship was partly caused by the negligence of the pilot, who must be regarded as a voluntary pilot for the purpose of the plaintiffs' claim. The fact that the defendants were also guilty of negligence contributing to the stranding will not avail the plaintiffs so far as this part of their claim is concerned, for under the rule of the common law in 1941 contributory negligence by the plaintiff completely barred his claim.

It remains for me to consider the plaintiffs' claim for breach of contract or warranty.

This part of the plaintiffs' claim was made by amendment of the statement of claim in July, 1946. The substance of it is that the defendants advertised through the inset in the Admiralty chart the width of the dredged channel to be 250 feet and contracted or warranted that the leading marks

(1) 1925 Scots L. T. 239; 21 Ll. L. Rep. 169, 170.

shown in the inset indicated the centre line of such channel or a line slightly southerly thereof and that the width of such channel was 250 feet. They do not allege in their pleading that the defendants warranted that the channel was maintained at any particular depth. Apart from the statement by the master of the ship about the chart, to which I have referred, the plaintiffs called no evidence that they or their agents contracted to send the *Towerfield* to Workington on the basis of a warranty that the channel was in the condition as stated in the chart inset. The only witness who dealt with the question of sending the ship to Workington was Mr. Motley and he was called by the defendants. The pleaded issue as to this warranty retired into such obscurity during the hearing before Willmer J. that the learned judge in his careful and reserved judgment made no mention of it. He said this : " There is not, I think, " any room for doubt as to the law to be applied. It is " admitted that the defendants exacted dues from the *Tower-* " *field*, and in return for this were under an obligation to exercise " reasonable care. The statement of claim contains an " allegation that the defendants warranted that the harbour " and approaches thereto were safe for navigation, but this " point has not been argued before me, presumably because " on the present state of the authorities it is unarguable. The " defendants' duty is to exercise reasonable care, and I think " this includes reasonable care to maintain the width and " depth of the channel which they saw fit to advertise, reason- " able care to find and remove any obstructions in such channel, " or, in the event of failure to remove obstructions, reasonable " care to warn the plaintiffs and other shipowners using the " port of their presence."

The evidence before the court which may be considered relevant to this point of warranty does not seem to prove that there was any such warranty. The statement made in 1933 by the defendants as to the state of the channel can not, I think, be taken as a warranty in 1941 that the same state persisted then. Mr. Monkhouse, the manager of the Board in his statement made in September, 1942, said that by reason of war conditions the period of dredging had been cut down considerably, owing to the impossibility of the dredger dredging at night. There were other difficulties in connexion with maintenance and repair of dredging plant in consequence of the war, and I do not think it reasonable to assume that a condition of things which was maintained by dredging in 1933, was warranted as being maintained in October, 1941, after two years of war. Moreover, I think it is clear from the statement of Mr. Motley, the port officer of the Ministry of War Transport, the charterers of the ship, that he knew in 1941 that the channel at Workington Harbour was not in the condition described in the chart inset. If there was any contract as to the state of the harbour which was made between the plaintiffs and the defendants, I think it was made by the charterers as agents of the plaintiffs with the defendants. The Ministry of War Transport directed the *Towerfield* to go to Workington, on the information supplied to them by the defendants as to the state of the channel. Mr. Motley's evidence was that Mr. Monkhouse used to give a regular statement to him of the amount of silt in the fairway and on that information he decided whether it was safe to send a ship with any particular draft to Workington. It was Mr. Motley who recommended to the Shipping Diversion Room (presumably a department of the Ministry of War Transport), that the *Towerfield* should be diverted to Workington. Mr. Motley also said that if there was an encroachment on the channel, Mr. Monkhouse would definitely have stated it and that if he had been so informed he would nevertheless have sent the *Towerfield* to Workington, provided the silt was not too high to permit of her passing over it in safety. He calculated the margin of safety as two feet more than the ship's draft. Mr. Motley seems to have been mainly concerned with the depth of water on the bar and to have paid little attention to any reduction in the width of the navigable channel. Presumably he expected the ship to proceed up the centre of the channel where the deepest water would be. The evidence of Mr. Motley is corroborated by the evidence of Mr. Highton, the managing trustee of the defendant Harbour Board.

If a warranty is to be implied in any contract made between the plaintiffs and the defendants as regards the use of the harbour by the *Towerfield* on October 19, I think there was also an implied term that those in charge of the *Towerfield* would navigate her with reasonable care and skill and that they would obey by-law No. 9 of the Port By-Laws, made on May 1, 1941, which is in the following terms: "The master "of a steam vessel navigating the dredged channel shall keep "to the centre of the channel." "Master" as defined by the Harbours, Docks and Piers Clauses Act, 1847, and incorporated in the by-laws "shall be understood to mean the person "having the command or charge of the vessel for the time "being." When the ship grounded she not only was not trying to follow the line of the leading marks but in fact was being navigated, either outside or at least on the extreme edge of the pecked line of the dredged channel as shown on the inset to the chart.

In my opinion the leading marks in this channel and the by-law made it essential that the *Towerfield* should proceed up the channel on about the lines of the leading marks, and that it was an implied term of the contract, if any, between the plaintiffs and the defendants that she would do so. The *Towerfield* grounded because she was not navigated on those lines, and by so doing the plaintiffs committed a breach of this implied term. Such breach directly contributed to the stranding, and seems to preclude the plaintiffs from recovering damages for breach of a warranty as to the state of the channel. In my opinion therefore the plaintiffs' claim also fails, in so far as it is based on breach of warranty.

I must now consider the defendants' counterclaim. The defendants argued in support of their counterclaim that even if they committed a breach of duty which contributed to the damage sustained by them, nevertheless they were entitled to recover it from the owners of the *Towerfield* by virtue of s. 74 of the Harbours, Docks and Piers Clauses Act, 1847 (which was incorporated in their Acts) if the owners of the *Towerfield* were also negligent, and their negligence contributed to the defendants' damage.

In the *Mostyn* (1) the defendants' ship damaged the plaintiffs' property and the plaintiffs then claimed under s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, from the defendants in respect of this damage. The House of Lords, reversing the Court of Appeal, held that the damage was not caused by any negligence on the part of the defendants but that the plaintiffs could recover their damage from them. The question whether the section applied to damage partly or wholly due to the negligence of the plaintiffs did not therefore arise, but two passages in the judgments bear on the position of the defendants if they were negligent. In the House of Lords, Lord Haldane, after pointing out that the general words of the section did not cover a case where the event causing damage occurred by the Act of God or the Sovereign's enemies

---

(1) [1928] A. C. 57.

C. A.
1948
Owners of the Steamship Towerfield v. Workington Harbour and Dock Board.
The Towerfield
Bucknill L.J.

added, at p. 64: "It would have been equally difficult to "hold that there was liablity if the damage had been caused "by the action of the undertakers themselves." The other passage is in the judgment of Sargant L.J. in the Court of Appeal, and is as follows (1): "I may perhaps add that the "case which was recently decided by Roche J. as to contributory negligence and as to the owners or undertakers of "a dock not being able to succeed where there was contributory "negligence was in my opinion correctly decided. That case "recognizes that in another respect a limitation may have to "be imposed upon the absolute liability apparently provided "by the statute." The case referred to is *Det Forenede Dampskibs Selskab* v. *The Barry Ry. Co.* (2). In that case whilst the plaintiffs' ship was being moved in the defendants' dock by the defendants' tug she collided with and did damage to the property of the defendants. The defendants claimed compensation from the plaintiffs in respect of that damage under s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, which was incorporated in their statutory powers. The judge found that the damage was caused not by the neglect of anybody on board the ship or employed by the plaintiffs but by the neglect of persons employed by the defendants. The judge decided that under those circumstances the defendants' claim failed for the following reasons. He said, at p. 659: "I am satisfied that in these circumstances this section does "not apply so as to enable the employers of the negligent "person to recover from the shipowners, and I am satisfied "that that is so, not merely by the reading of the section, "but by the application of the section, and that nobody can "take advantage or avail themselves of the wrong for which "they are themselves responsible. If the company them- "selves gave rise to the cause of the damage done through the "ship, they are assisting, as in the present case, and, in my "judgment, they cannot recover damages caused by neglect "on their own side." Mr. Devlin argued that the process of reasoning applied by Roche J. in that case did not apply where the shipowner is partly to blame, and the Dock Company is also partly to blame, because in such a case it is not necessary for the Dock Company to assert its own wrong in order to recover for the damage partly due to the negligence of the shipowner. He argued that the true principle underlying the decision in the *Barry Railway* case was that the Barry Railway's claim should be dismissed to avoid circuity of action. Any sum recovered by them against the shipowner would be added to the shipowners' claim against the Railway Company in respect of their negligence. This however would not be so if the shipowner was also negligent because by the rule of the common law before 1945 his claim would be defeated by his own contributory negligence. I think the answer to this attractive argument is that s. 74 of the Act of 1847 does not apply to damage done to the harbour authority's property if it is wholly or partly caused by their negligence. It seems to me that the principle laid down by Roche J. in a case where the damage is solely due to the negligence of the Harbour Authority, should also apply where the defendants' negligence has partly caused the damage. To allow the Harbour Authority to recover their damage under such circumstances would infringe the rule to which Roche J. referred that nobody can take advantage of the wrong for which they are themselves solely or partly responsible. That was the rule of the common law, before Parliament modified it by applying the Admiralty rule as to division of loss, and I think it should be the rule in a case where a claim is made under s. 74 of the Act of 1847.

---

(1) [1927] P. 25, 27.

(2) (1919) 1 Ll. L. Rep. 658.

For these reasons in my opinion the claim of the plaintiffs fails, and the counterclaim of the defendants also fails and the judgment of the trial judge should be varied accordingly.

SCOTT L.J. This is the judgment of my brother ASQUITH and myself.

This is an exceptionally difficult case. With our brother Bucknill's statement of the facts we are in general agreement, and do not attempt any detailed re-statement of the facts of our own. We note the answers of our assessors on the questions of seamanship which we put to them but do not regard them as concluding the further question of negligence. No doubt the difference between bad and good seamanship usually disposes of the issue of blame or no blame but that consequence is not automatic. Decision on all questions of mere fact rests with the court: and in this appeal the issue of negligent navigation is exceptionally dependent upon the particular facts as found by us. It is for the court to find negligence and not for its assessors, whose function is limited to giving expert evidence. In our questions to them we were careful not to invite or indeed to leave, any opening for any expression of opinion by them in the court's exclusive field,

C. A.
1948

OWNERS OF THE STEAMSHIP TOWERFIELD v. WORKINGTON HARBOUR AND DOCK BOARD.
THE TOWERFIELD

Scott and Asquith L.JJ.

although we suspect that, had they been asked, they would have said that the pilot's choice of course up channel was an error of judgment and not negligence. In the result, after anxious consideration, we have come to the conclusion that the Harbour Board are precluded from alleging that the grounding of the ship was caused by what appeared to our assessors to be bad seamanship and to the learned judge to be negligence on the part of the pilot by the Board's own failure to convey to the pilot essential and crucial information which it was their duty to convey to him in relation to the maintenance by themselves of the navigable channel: for, by so failing, they misled him into taking the course up the channel which he did take. Indeed, the legal position may be stated in an even more direct and positive form. Negligence consists in taking action which the actor ought, in all the relevant circumstances of the case, to have foreseen was likely to cause harm. In the present case we are satisfied that had the board given the pilot certain information, of which it was fully aware, it would beyond all doubt have caused him to give the north bank just that slightly wider berth which would have prevented the stranding. But before we deal with this final factor in the acquittal of the pilot from blame, there is a whole series of other special circumstances which call for consideration in the review which it is our duty to make of the learned judge's attribution of grave blame to the pilot, and of his decision that the pilot's fault was the sole cause of the stranding. We will enumerate the chief ones. (1.) October, 1941, was a very critical time in the war when it was of urgent importance to get the cargo of ore to its destined smelting works without delay. (2.) It was dangerous, for ship and cargo alike, to remain outside in the Roads. (3.) The unexpected and sudden failure of the tug to materialize, only reported to the pilot when already at the ship, made the entry of so large and deep drafted and long a ship to his own knowledge very hazardous, for the following, amongst other, reasons. (4.) The 250 feet channel was constricted to 155 feet by (i.) a wide bank on its south side, and (ii.) the causa malorum, some unknown degree of silting up on the north side in the neighbourhood of the Bush Perch, due to flood waters from the Derwent, although the pilot, as a result of his own experience, thought the "freshet" from the river would have tended to remove it. (5.) It was quite impossible to go up the narrow channel except at dead slow—between 2 and

3 knots—which meant that wheel action would have little and slow effect on the ship's heading. (6.) The *Ashbury* had to go in first—namely, at the best moment in regard to high water, and the *Towerfield* could not begin to go in until just after high water, when the force of the freshet from the Derwent would no longer be neutralized by the flood tide, but actually augmented by the ebb, with the very grave consequence that, if it caught the *Towerfield* on the port bow, it would, in the absence of the tug, have been almost impossible in the space available to prevent the ship going aground on the south shore of the turning basin. (7.) The freshet current would tend to flow across the turning basin in the same direction as it had been following in the bed of the Derwent at its mouth, and would, therefore, as the chart shows, meet the *Towerfield's* stem just as it was passing the Bush Perch. To prevent that strong current catching the *Towerfield's* port bow, and thereby pushing her head over to starboard, it was essential to hold the *Towerfield* on her channel course of 131 degrees true as close as was safe to the northern edge of the channel. This is a conclusion of fact, which, in our opinion, is in no way affected by any answer of the assessors to our questions. (8.) There were no buoys or other marks on the outside of the northern edge of the dredged channel, the only landmark there being the Bush Perch. (9.) Our assessors advised that from the aspect of seamanship the pilot was right in keeping well away from the obstructing bank on the south side and was justified in choosing a course, at any rate slightly, to the *north* of the leading marks line. (10.) He had forty years' experience of the channel, and, in a position of national urgency, where any course up channel involved dangers, he deliberately chose his more northerly course, because he thought it was the lesser danger. (11.) We are satisfied that the sole reason he failed to give the northern bank a wider berth was that he thought that if he took his 131 degrees course further to the south he would surely open his port bow to the freshet as he passed the Bush Perch, and that, he thought, would be fatal. On the power of the impact from the freshet to deflect his ship's head to starboard as it got close to the turning basin, we suspect that he knew more than our assessors. (12.) He was kept by the Harbour Board in ignorance of two facts of vital moment to the navigation of the ship in the above-mentioned circumstances, namely (*a*) that in spite of the board's knowledge that their dredger had been for some time off duty and unable to dredge

C. A.

1948

OWNERS OF THE STEAMSHIP TOWERFIELD v. WORKINGTON HARBOUR AND DOCK BOARD.

THE TOWERFIELD

Scott and Asquith L.JJ.

on the north side, they made no inspection on the last springs before October 19, namely, on the sixth and seventh: and (*b*) that the harbourmaster had himself been down on the north side at low water on the seventeenth and had then seen a serious accumulation of silt only 2 feet under water in the channel.

The most material point of concrete fact in the evidence on which we are disposed to differ from Bucknill L.J. is about the harbourmaster's message to Craig through the pilot Stevenson "to keep to the north of the centre-line of the channel." As the only form in which the harbourmaster's evidence came before the court was his written statement, he could not be cross-examined about this message, but we do not understand why the learned judge disbelieved the story of the message. Those two pilots seem, on a perusal of their evidence, to have been honest witnesses, and that piece of evidence seems to be probably true; it fits in with their description of the harbourmaster's general behaviour towards them. But the point does not affect our general conclusions, and we do not attempt to make any definite decision about it. Whether he got the message or not, we are of the opinion, for reasons which follow, that his conduct cannot be relied on by the Harbour Board as contributory negligence, having regard to the form which their own negligence took: for we entirely agree with the learned judge's conclusion that the Harbour Board was gravely negligent in regard to their common law and statutory duty (*a*) to dredge continuously in order to keep the port open, (*b*) to inform themselves about its state, and (*c*) to warn shipowners, and, above all, their pilots, thereof. If, contrary to our view, the pilot was negligent, we also profoundly agree with Bucknill L.J. that the learned judge's conclusion, that the pilot's negligence was the sole cause of the stranding, is wrong. The defendants' negligence was a continuing negligence, which was operating so as to cause the accident up to the very moment it happened.

Before further considering the views both of Willmer J. and of our brother Bucknill in the realm of tort, it will be convenient to consider an essentially different aspect of the legal problems raised by the litigation, which arises from the fact that the two parties were, in our opinion, in a contractual relationship, by which they had committed themselves to various promises and conditions. The consequential bearing of the relationship upon their mutual relations, not only in contract but also under the law of tort, must be considered, in order to ascertain their final liabilities to each other. We turn, therefore, at once to that question of contract. There was some argument on behalf of the respondents that the contractual question is not open on the statement of claim, but we reject that contention. The fact of a contract was pleaded in the statement of claim as a fact, and the defendants could have asked for particulars of it. Besides, it is facts, not law, which a good pleading should contain, and the content of this contract is almost entirely a question of pure law. In addition, the contractual issue was argued below and before us, and we regard a clear understanding of the contract between the parties as an important factor and possibly as the real key to a just solution of the appeal.

Where two litigants are asserting cross-claims against each other for the tort of negligence, legal duties and liabilities are both likely to have been materially affected, if there also existed at the relevant time a contractual relationship between them relating to the matters out of which the cross-claims arose. That platitude has direct application to the present appeal. The defendant Harbour Board in 1931 caused the maritime public to be notified of the facilities afforded to shipping by their harbour, on payment of dues and charges. The inference is irresistible, that they did so by way of invitation to those interested to bring or send ships to their harbour, and so increase the Board's revenue. The notification was achieved by the most effective means, namely, by getting it put on the appropriate Admiralty chart and into the West Coast Pilot, the book containing the usual information to mariners, and kept up to date in the customary way by Notices to Mariners, from time to time, of navigational changes. The dues and charges were not mentioned, no doubt because they were on the usual scale and would be taken for granted. The intermediary for the purpose, who in fact acted as the board's advertising agent, was the Hydrographic Department of the Admiralty in London, and the arrangement with it was made by correspondence, which was before this court and the court below. The opening request, in October, 1930, was for the issue of a separate large-scale chart of the port: but effect to it was given by a large scale inset on the ordinary chart. We think it first appeared as an inset plan in the 1931 edition, on a natural scale of 1/10000, under the heading "WORKINGTON. From plan supplied by the Dock & "Harbour, 1931, with additions from the Ordnance Survey," The channel was not then completely dredged, but it was soon after in fact dredged to 20 feet below ordnance datum, or 2·2 feet below the sill of the dock, and from 1933 onwards the inset on the west coast chart carried on the left of the plan, under the heading "Dredged depths" the following words: "In the Approach Channel and Turning Basin within the "pecked lines a depth of 4½ feet at chart datum is maintained "by dredging. (1933)"—that is, to sill level. Chart datum then was, and continued at all material times to be, 4½ feet above the dock sill. That printed notice of the port, in our opinion, was a standing invitation to use the dock, and, therefore, constituted an offer to all, whom it might concern, of the navigational facilities of the channel and turning basin, as described in the inset plan, and permanently maintained by dredging to the stated depth. It was an offer of a contract, to be accepted by any shipowner by conduct, namely, by his act of starting to send his ship through the dredged channel into the Workington Dock: whereupon the contract would be formed and all the reciprocal terms of the contract would become operative. Its fundamental feature was the continuing express warranty of a "maintained" depth of 4½ feet below datum. In our view, the fact that there was an express written or printed warranty eliminates any such ambiguity of language in the terms of the Harbour Authority's fundamental promise, as was the subject of controversy and decision in the *Moorcock* (1). There, just because there was nothing said by way of description about the safety to the berth when the shipowner agreed to send his ship to the defendants' wharf, the court had to supply the deficiency by implying the unexpressed, but necessarily intended, term. In the offer made by the defendant Board there is no room for any such basic implication, since the depth is expressly defined by its own offer as a minimum depth maintained over the whole area of the approaches to the dock: indeed, the words: "See note "on dredged depths" are actually printed on that area as shown on the inset plan, the words running in a line parallel to the direction of the channel and into the turning basin. That express undertaking in the printed offer therefore absolves the court from the necessity of implying a basic warranty, as was necessary in the *Moorcock* (1). But, although the basic warranty is express, there are, nevertheless, in our opinion, still certain unexpressed terms—simple and reciprocal—which

(1) 13 P. D. 157; (1889) 14 P. D. 64.

C. A.
1948
-
Owners of the Steamship Towerfield v. Workington Harbour and Dock Board.
The Towerfield

Scott and Asquith L.JJ

must be implied, on the *Moorcock* principle, in order to give to the mutual undertakings of the parties that business efficacy which must at the least have been intended by them. That principle imports a duty on the court, as a matter of law, to read into the express language of the contract just that minimum of additional provision, which the intended business efficacy requires, but no more than that minimum. The dominant consideration is the obvious absurdity of the Harbour Board attempting to warrant in advance that nothing would ever happen in the future to prevent the Board from carrying out its unqualified promise of a continuously maintained minimum depth throughout the described channel and turning basin. Some interpretation of the printed terms of the Board's offer must be found which will make sense of it. In our opinion, there is no difficulty in discerning what the written offer must have implied and construing it accordingly. Three mutual undertakings are obviously implicit. We begin with their content only and postpone their legal relationship. The first is a proviso, in favour of the Board, broadly to this effect : " If at the moment when the contractual relationship " is established by the shipowner's acceptance by conduct of " the Board's offer (namely, either by sending his ship there or " by his notifying to the Board or its agent the intended entry " of his ship into the port) there shall then be some obstruction " in the channel or turning basin which either completely " prevents reception of the notified ship or makes its entry to " the port more difficult, by reason of some obstruction in the " advertised area of maintained depth, the Board shall be " relieved from their absolute warranty upon giving to the " owner, or his master, timely notice, as the case may be, " of the fact of such prevention or of the cause of such " obstruction." The second implied promise is that such notification by the board shall in the case of a restriction include all reasonably requisite information so as to enable the ship nevertheless to enter safely. The third is a promise by the owner that the ship shall be navigated inwards with all reasonable care and skill. With that further content of reciprocal terms, implied on the *Moorcock* (1) principle, but subject to their legal relationship to each other which we shall consider next, the contract, in our view, gives full, but no more than full, efficacy to the business bargain, which must at least have been intended. The reasons for the implication are obvious. It was impossible for the Board, at any moment of time when advertising on the chart their continuing offer, to have really intended to undertake absolutely that nothing would happen thereafter which would block the channel or turning basin, or put the dock gates out of action, or interfere with dredging operations, and so make their promise impossible of performance. Indeed, even at the time of the offeree's acceptance the difficulty in the way of performance might, unknown to the board, have already arisen. The possibility of such occurrences would, of course, always continue to be present, year in and year out. One legal solution of this difficulty might be to reject altogether the contractual interpretation of the Board's advertisement ; but that solution seems to us contrary to first principles of law upon the formation of contract (e.g., *Carlill* v. *The Carbolic Smoke Ball* (1)), and we reject it. The right solution, we think, follows necessarily from the *Moorcock* principle, that some provision to meet that difficulty must be inferred to have been present to the mind of the Harbour Board when issuing the notice of its continuing offer, and equally to the mind of any shipowner or shipmaster on behalf of his owner when silently accepting the offer by conduct. Some extent of implication is, therefore, inevitable ; but we conceive the *Moorcock* principle to call for the smallest departure from the express terms which can give to the bargain that business efficacy which must at the least have been intended by both parties in order to achieve the object of the contract. Those premises lead us to a two fold conclusion. The first part of our conclusion is that what is called for is not a modification in the Board's contractual promise itself, but a partially resolutive condition upon the Board's continuing to be bound to perform it, such as we have already stated. The performance by the Board of their implied promise of due warning, effected by their supplying reasonably sufficient information to the owner and his master, is, in our view, just as much a contractual duty undertaken by them as was the provision of a safe berth under the promise of the wharfinger, defined by this court in the *Moorcock*. The second part of our conclusion is this. The express and absolute promise of minimum depth having been volunteered by the Board for publication on the chart, it would, in our opinion, be contrary to good faith that they should be released from the absolute warranty which the

---

(1) 13 P. D. 157 ; 14 P. D. 64.

(1) [1893] 1 Q. B. 256.

advertisement imports, except conditionally upon full performance of the lesser promise of due warning. The importance of that interpretation of the Board's promise—(all the terms of which, in our opinion, are either expressly or impliedly contained in the Board's written offer)—is that it put on the Board the whole onus of proving complete compliance with the lesser obligation of the resolutive term as a condition precedent to their exemption from the absolute obligation of the printed warranty. For the purpose of implementing that implied condition of due warning, the Board impliedly promised (*a*) to take scrupulous care to keep their own knowledge of the state of the channel and turning basin up to date; (*b*) that, whenever there was an obstruction there, which by due diligence they could ascertain, they would inform the shipowner or his master of its locality, nature and size; (*c*) that, if at any time prevented by any cause from taking soundings or other necessary steps to ascertain those particulars, they would give plain warning of the failure and of their own resultant doubts; and, finally, (*d*) that they would keep the compulsory pilots, stationed by Trinity House at the ports on that coast, informed both of obstructions of which the Board knew and of the relevant gaps in that knowledge and of any failure by them to keep that knowledge up to date. In our view, all these four duties (*a*), (*b*), (*c*) and (*d*), owed contractually to the shipowner, were owed by the Board at common law equally to the pilots, as members of the maritime public using the approaches to the dock; but performance of the duty to keep the pilots informed could not in any way relieve the Board of their separate duty, both in tort and by contract, to inform the shipowner—for the pilot was not the shipowner's agent for the purpose of receiving information from the Board about obstructions, notice of which the Board was thus, at any rate in contract, bound to bring personally to the mind of the shipowner, and probably also of his master. The Board might properly send a message by the pilot, but if that pilot failed to deliver it they would not have discharged their secondary duty, namely, of keeping the shipowner informed. Nor were they entitled to rely on the pilot having acquired for himself the knowledge, which it was the Board's own duty—contractual and at common law—to acquire and hand on to the owner by way of warning. Even if s. 15 of the Pilotage Act, 1913, on its proper construction means (what it does not say) that the compulsory pilot is to be deemed for all purposes (including contract) the servant of the shipowner (which, in our opinion, it does not) he would not be such servant until after taking charge of the vessel for the pilotage run into port.

Before discussing further the proper interpretation of s. 15, it will be convenient to consider the plaintiffs' legal position in regard to the claims by them and the counterclaim against them in negligence. For that purpose we will assume provisionally that in regard to both cross-claims in tort and mutual pleas of contributory negligence, as argued by Mr. Devlin for the Board, the section does, on its true interpretation, mean that the compulsory pilot is to be deemed to be the servant of the shipowner. On that footing we should, in the legal realm of tort, but for one vitally important aspect, to which we will recur in a moment, agree with the contention, that in this litigation, begun in 1942, relating to events in 1941, and governed by the common law rule of no recovery then obtaining in relation to contributory negligence, neither the plaintiffs nor the defendants could, if each were negligent and by that negligence contributed to the accident, recover against the other. The important aspect of the present case (to which we referred just now) is the neglect by the Board to give to pilot Craig the vital information in their possession—to which we have already made reference. That information was in part of a negative and in part of a positive character, relating to the state of the bank of silt on the north side of the channel near the Bush Perch, where the Board for some months before October, 1941, had been conducting intermittent dredging operations. The Board lay under a heavy and continuing duty to shipowners and to the pilots twice in the lunar month, namely, at every springs, when alone inspection of the bottom was practicable, to inspect and ascertain by proper examination and soundings the real condition of the channel and turning basin in relation to its advertised depth; but, in spite of this urgent duty, on the very last springs before the *Towerfield* came in, namely, on October 6 and 7 the Board's officers actually omitted to make any inspection on the north side. As for months past they had known about the encroaching bank there, and had been engaged regularly in trying to dredge it away, this omission was inexcusable. The gravamen of that omission was that they never informed either the plaintiffs or the pilot of their total ignorance at the crucial time before the *Towerfield* was due of the state of affairs on the north side of the channel caused by that omission. The impending

C. A.
1948

OWNERS OF THE STEAMSHIP TOWERFIELD *v.* WORKINGTON HARBOUR AND DOCK BOARD.

THE TOWERFIELD

Scott and Asquith L.JJ.

advent of the *Towerfield* made their own complete want of up-to-date knowledge itself a most important piece of information of which to warn at least the pilot. That was the negative breach of duty. But there was a positive breach also. On October 17 the harbourmaster, Thompson, had, on that spot, by looking down from above, actually seen the bank there lying only 2 feet under the eater. That evidence is crucial, for it shows conclusively the knowledge of the harbourmaster only two days before the *Towerfield* was due to enter. A depth of water of 22 feet on the seventeenth meant (apart from wind effect, which could not be foreseen the day before) only 23 feet 7 inches on the mid-day high water of the nineteenth —and the *Towerfield's* draft was 24 feet aft.

We simply cannot imagine why the board did not make a point of telling Craig (1.) that no soundings had been taken on October 6/7 and (2.) what the harbourmaster himself had positively ascertained on the seventeenth. It is true that on the seventeenth Craig had had a look, but only across the whole channel from the south pier—and, from there, he obviously could not see what Thompson, when looking downwards from his position on the north foreshore, saw "under water." In our view, pilot Craig's mistake in thinking it proper to set a course as near as "50 or 60 feet from the Bush Perch" (and "safe at 40 feet") was thus directly induced by the defendants' own breach of their duty, owed in tort to him as a very special member of the navigating public (as well as to the plaintiffs) to keep him informed about the north bank: for we think he was entitled to infer, and we believe he did infer, from the Board's silence, an assurance that they knew of nothing in that locality likely to interfere with the navigation of the *Towerfield* without a tug. This impression on his mind might well be strengthened when he got—if he did get it—from pilot Stevenson the message from the harbourmaster to bring the *Towerfield* up the channel on the north side of the leading marks. We cannot accept the learned judge's finding that that message was not sent him: but, even without it, the Board's withholding of the two vital pieces of evidence, which we have mentioned, was a dereliction of duty by the Board, both at common law and in contract, which deprives them of any defence to the plaintiffs' claim, whether in tort or contract. We will assume against the plaintiffs for this purpose that the effect of s. 15 of the Pilotage Act, 1913, is to make the shipowner responsible for the conduct of the pilot to exactly the same degree and

C. A.
1948

OWNERS OF THE STEAMSHIP TOWERFIELD v. WORKINGTON HARBOUR AND DOCK BOARD.
THE TOWERFIELD

Scott and Asquith L.JJ.

extent for all purposes as he is for the conduct of the officers of the ship employed and paid by him. In tort perhaps the simplest way of stating the position is this: The only negligence alleged against the ship is that of the pilot. He is said to have steered a course negligently near to the north bank of the channel in the neighbourhood of the Bush Perch. But negligence is want of due care in the light of all the circumstances: and one most material circumstance was the Harbour Board's silence on the two vital points of relevant information which we have mentioned. Because of that silence he thought he could safely go as near as only 40 feet from the Bush Perch, and, with that in mind, decided to keep a distance from it of 50 or 60 feet. Had he been given those two vital pieces of information it is obvious that he would have added a further margin of clearance—and very little was needed for the ship never to have touched at all—as is proved by her listing, in spite of her flat bottom, over to starboard as much as she did. We have no doubt that another 20 feet and probably only 10 feet, of additional clearance would have sufficed to avoid her touching the bank, and at the worst to prevent her being held by it. It is for that reason not open to the Board to charge the pilot with negligence for failing to avoid a hidden danger, of the presence of which they could, and should, have warned him. That, to our minds, disposes of the defence of contributory negligence. Another legal way of formulating an answer to the defence of contributory negligence would be afforded by the maxim that the defendants cannot avail themselves of their own wrong, namely, their failure to perform their common law duty owed both to the shipowner and to the pilot, as users of the channel fairway, to inform them of the facts in question.

In contract the same considerations dispose of any charge of breach by the shipowner of his implied promise to navigate with care and skill. Possibly also the same facts may be expressed as an estoppel of the defendants by their implied representation to the shipowner and pilot alike that they knew of no obstruction to prevent the ship passing quite close to the north side of the channel. It is no excuse to the Board to say that the pilot might have found out for himself. We see no ground for imposing on pilots the duty of watch-dog to smell out the Harbour Board's own failure in its duties of maintenance. Their duty to inform the pilots was independent of any practice by the pilots to make investigations for themselves. For the above-mentioned reasons, we are of opinion that the common law defence of contributory negligence based on the negligence of the pilot cannot, on the exceptional facts of the present case, operate as an answer to the plaintiffs' claim even in tort. But, even if in spite of the very exceptional facts of this case, we are wrong in that legal conclusion about the position in tort, we are satisfied that those facts afford no answer to the plaintiffs' claim in contract. The nearest approach to such a defence as an answer to a claim for damages for breach of contract would be the contention that the damages did not flow from the breach, but solely from the plaintiffs' own act; and the reasons we have mentioned for rejecting the defendants' plea of contributory negligence seems to us equally a sufficient answer to that contention. In addition, that contention in the present case could, in any event, only be established by proof that the compulsory pilot was the shipowners' servant even for purposes of an action in contract. He is not that at common law—and that issue therefore resolves itself into a pure question of law, arising on the interpretation of s. 15 of the Pilotage Act, 1913, whether, even in an action of contract, the compulsory pilot is to be treated as the servant of the shipowner.

Before considering what bearing the section has upon an action in contract, we will discuss its bearing upon an action in tort. The section requires very careful interpretation. If we give all the words of sub-s. 1 their natural meaning, the word "answerable" plainly presupposes an antecedent question or demand by some other person and calls for an answer. In its statutory context one can eliminate the idea of a mere "question" and concentrate on "demand." The demand contemplated by the statute prima facie will have been made by a claimant actual or intended. In that context, therefore, the word must contemplate the answer of a person compellable by law to make answer to such a demand. The problem of construction for the court is to decide in what circumstances that person is to be compelled to make such answer. Prima facie, the person called upon to answer will, therefore, be someone in the position of defendant to a legal claim. If it is contended that the word "answerable" is to be stretched beyond that natural meaning so as to give it a less natural meaning, e.g., that the owner or master of the vessel shall be answerable for the pilot's navigation for all purposes, whether of asserting or resisting a claim, there must be sufficient reason for construing the statute so as to give it a meaning to some extent non-natural. We agree with Bucknill L.J. that there is some degree of ambiguity in the sub-section: and that conclusion at once brings in the ordinary rule of construing ambiguous words in a statute, namely, to have regard to the scope and object of the statute and to the nature of the mischief to which it was directed. In the case of s. 15 of the Pilotage Act no indication of that kind can be found in any other section of that Act; but sub-s. 2 of s. 15 does give a plain clue; for it in effect records that the section was introduced for the special purpose of complying with an international convention. That convention was the Collisions Convention, brought into law by the Maritime Conventions Act, 1911, and it was primarily art. 5 of that convention which called for the alteration of the law as then defined by s. 633 of the Merchant Shipping Act, 1894. The convention was published by His Majesty's Government as a White Paper in Cmd. 5558 (1911). It was made law in the United Kingdom by the Maritime Conventions Act, 1911. Article 5 reads as follows: "The liability imposed by the preceding articles attaches in "cases where the collision is caused by the fault of a pilot, "even when the pilot is carried by compulsion of law." The object of that convention, signed at a Diplomatic Conference convened by the Belgian Government at Brussels in order to consider a draft convention previously framed by the Comité Maritime International was to unify certain rules of the municipal laws of all nations relating to collisions between ships, or to damage caused (without collision) by one ship to another ship and her cargo. It was concerned only with what English common law calls "torts" and English Admiralty law calls "fault," and what continental law, based on the Code Napoléon, calls by the French word "faute." That convention had nothing whatsoever to do with contract. One of us happens to have personal knowledge of its object, as the late Lord Sterndale and he had, as a member of the Comité Maritime International, taken part in its antecedent conferences at which the convention had been drafted; and he was subsequently one of the delegates of His Majesty's Government who at the Diplomatic Conference at Brussels, with His Majesty's Ambassador in Belgium, Lord Sterndale and Mr. Hugh Godley (now Lord Kilbracken), as delegates of His Majesty's Government, negotiated and signed the revised convention. When, in the same year, the Maritime Conventions Bill to implement the Collisions Convention and the Salvage Convention was before Parliament, a general Pilotage Bill was also already projected, and the enactment of a provision to give effect to art. 5 of the Collisions Convention was, to the knowledge at the time of one of us, left over for inclusion in that bill. That is the explanation of sub-s. 2 of s. 15 of the Pilotage Act as passed. But no such Order in Council was made and sub-ss. 2 and 3 were eventually repealed by the Statute Law Revision Act, 1927. We recognize that the language of s. 15 plainly goes beyond art. 5 of the Collisions Convention and that, to the extent that that extension is unambiguous, effect must be given to its greater scope; but on ordinary principles of interpretation any residual ambiguity in language should be construed with due regard to the object of the statute. We note particularly, for instance, that the scope of the section is not limited to collision between ships, or even to damage caused by one ship to another without collision, the only other eventuality contemplated by the convention. But two limitations on any extension of its meaning beyond the scope of art. 5 should, we think, be observed and applied. The first is that its scope should be regarded as limited, as was the convention, to actions in tort: or, conversely, that the convention contained no justification for extending the section to actions of contract. The second is another presumption from both the convention and the Maritime Conventions Act, 1911. It is less strong than the first, because it disregards altogether the limiting force of the consideration, that the word "answerable" prima facie means answerable as defendant to a claim: but the purpose of giving effect to art. 5 of the convention, in the sense undoubtedly intended by the convention, outweighs that consideration. The main difference between English and continental law was that in our court of Admiralty where both ships were to blame the damages suffered by each were added together and then arbitrarily divided in half and liability apportioned accordingly. The continental principle was the proportional rule and the main object of the convention was to make that rule universal. The Maritime Conventions Act, 1911, carried that object into law in the United Kingdom. As between litigant ships we think that characteristic of the Act of 1911 justifies an interpretation of s. 15 of the Pilotage Act, 1913, which will extend the conception of the word "answerable" to the plaintiff ship as well as the defendant ship. But, even if that is so, we feel great difficulty in attributing to the plaintiff shipowner suing a harbour authority (which is not concerned in this action as owner of a ship) any greater freedom from the statutory attribution of the compulsory pilot's fault than he would enjoy if the defendant were the owner of a delinquent ship. For these reasons we come to the conclusion on the history of the section that it would apply in the present litigation, in regard to the cross-claims in tort, if the plea of contributory negligence were established. The historical investigation made by our brother Bucknill L.J. supports that conclusion. But we see no justification for extending s. 15 to the case of a shipowner suing, as in the present action, in contract. The section should be read as strictly limited to actions in tort where negligence of the compulsory pilot is alleged, whether the ship be defendant or plaintiff.

There are, however, two features of the facts given in evidence which seem at first sight to raise complications in the solution of the contractual problem, although in the result we do not think that they do. The first is that the approximate mid-channel line set by the leading marks along the channel was fixed in early days when the channel was only 150 feet wide and not altered when its width was increased to 250 feet. The astonishing thing is that the original by-law (No. 9) directing a mid-channel course was never altered, and the pilots were never informed as to exactly where it lay in relation to the northern and southern sides of the channel as they were in fact intended to be dredged. This feature does not require judicial consideration in the appeal, because in the result, although it is pleaded in the first part of para. 7 (*a*) of the amended statement of claim, the failure of the Harbour Board to shift the leading marks to the middle line of the widened channel, so as to avoid stultifying by-law No. 9, had no materiality on the facts of the litigation. It did not contribute to the stranding of the *Towerfield*. The second feature raises a greater, but not insoluble, difficulty. It is this. In order to guide the dredgers, dredging marks were erected in the shipbuilding yard to the north and south of the leading marks for the purpose of guiding the lines up to which the channel was to be dredged to the advertised depth by the dredgers. How the southern dredging marks were set, and whether accurately or inaccurately, does not appear in evidence. But it did appear in evidence that the northern marks were set so as to make the northern edge of the channel parallel to the line of the leading marks, for the line projected from the northern dredging marks diverged

C. A.

1948

OWNERS OF THE STEAMSHIP TOWERFIELD *v.* WORKINGTON HARBOUR AND DOCK BOARD.

THE TOWERFIELD

Scott and Asquith L.JJ.

as it went north-westwards from the line of the leading marks to an extent which at a point opposite to the Bush Perch was said to make the total width of the dredged channel 282 feet instead of 250 feet, and when scaled on Document No. 7 (Mr. Deane's plan) shows 290 feet. It was within this additional width that the northern bank formed on which the *Towerfield* took the ground. The apparent complication in the contractual problem is, therefore, this. Ought the scope of the defendant Board's undertaking as to the dredged depth of the channel to be treated as limited to the 250 feet width? In our opinion it ought not, for these reasons. Although the dredging marks were erected as guides to the dredgers, the Harbour Board knew quite well in the autumn of 1941 that the actual line of full channel depth on the northern side of the channel, to which the dredgers were directed to work, was in fact always treated by everybody concerned as the limit of the channel proper, and the northern dredging marks were being used by shipping as a de facto guide to show where it lay. The harbourmaster in his statement admitted that in practice—no doubt as a natural result of the known orientation of the dredging marks and of the Board's habitual dredging of the channel up to the two lines so indicated—shipping traffic, including the pilots, treated those two lines so fixed as the northern and southern boundaries of the channel and the two pairs of dredging marks as a navigation guide. The Board's own sounding charts of the channel show the channel as defined by the two dredging lines. Parenthetically we are satisfied on the evidence, including the plans and drawings put in, that the line of the dredging marks was at the bottom of the ramp to which the sides of the channel were dredged. The result, in our view, is that the warranty in the advertisement on the chart must be construed as applying to the channel as it might from time to time be defined by the Harbour Board's dredging marks. In truth, the delineation of the channel on the Admiralty inset should be regarded as a guaranteed minimum, subject only to the implied contractual implications which we have endeavoured to expound. The chart advertisement was thus a continuing offer, to be interpreted in the light of the practice to which the harbourmaster speaks as well as the pilots, the minimum width being extended by the public knowledge of everybody using the port that the northern line diverged as it went westwards from the leading marks line. In this way what we have said about the contract is applicable to the actual dredged channel, which continued

BIBL. LONDIN UNIV.

to be held out by the Board as the channel of approach, to which their dredging was addressed. It will be observed that we approach the contractual problem from a different angle from that of Bucknill L.J. It speaks for itself in most respects, but there is one explanatory comment we think may be useful. In our view, the charterers have no concern in this litigation. There is no allegation on the record that the Government were demise charterers, employing master and crew as their servants, or as in any way entitled to control the navigation or management of the ship—and no charterparty was put in evidence. We assume that, as in ordinary mercantile time charters, there was in the Government's charter an undertaking by the owner to carry out such voyages as the charterer might direct; but that contractual right does not take the decision to enter a particular port out of the hands of the shipowner or his master—and in the present case the sending of the ship to Workington was the act of the owner, and the decision on the fateful day to cross the bar on the way in was the master's, as was proved in evidence. It was at that moment that the contract we find in the evidence was made.

Even on the issue in tort we dissent from our brother Bucknill's conclusion that the plea of contributory negligence succeeds. In so far as the erroneous navigation by the pilot was caused by the Harbour Board's own failure of duty, whether at common law or by reason of their contract with the shipowner, to give him essential information, the Board are precluded from relying on his error as constituting negligence either on his own part or on the part of the shipowner, even though s. 15 of the Pilotage Act requires the court to regard the relationship between the two as that of master and servant.

The conclusions to which we come are that the plaintiffs succeed on their claim in contract and also on their claim in tort, and that the defendants fail on their counterclaim as well as on their plea of contributory negligence. There will be judgment accordingly, with costs here and below.

Appeal allowed.

Solicitors for the plaintiffs (the appellants): *Constant & Constant.*

Solicitors for the defendants (the respondents): *Thomas Cooper & Co.*

H. G.

SQUIRE v. SQUIRE.

C. A.

1948
Apr. 19, 20, 21;
May 14.

Tucker and Evershed L.JJ. and Hodson J.

Divorce — Cruelty — Invalid wife — Excessive demands made on husband—Detriment to health—No intention to cause injury.

The principle that a person must be presumed to intend the natural and probable consequences of his or her acts is applicable to acts alleged to amount to cruelty in matrimonial causes. It is not necessary, therefore, to constitute cruelty that conduct complained of should have proceeded from malignity or an intention to harm the complaining spouse.

Where, therefore, an invalid wife made excessive demands on her husband, which included requiring him to read to her through the night, and otherwise prevented him from sleeping, with the result that his health and efficiency as an army officer became impaired, though his wife did not so behave with the intention of harming him,

Held, that the absence of a malignant motive did not prevent that conduct from amounting to cruelty; and (Hodson J. dissenting) that, in the circumstances proved, it amounted to cruelty in fact.

Dictum of Shearman J. in *Hadden* v. *Hadden* The Times Newspaper, December 5, 1919, approved.

Astle v. *Astle* [1939] P. 415 criticized and distinguished.

Decision of Finnemore J. 63 T. L. R. 572 reversed.

Appeal from a decision of Finnemore J.

The appellant husband and the respondent, his wife, were married in 1932. The husband was an officer in the army. In 1936 he was posted to India, and his wife followed him in 1938. She had suffered from serious illnesses from early life, and had undergone two grave operations since her marriage. She was in a nervous condition and suffered severely from insomnia. Over a period of some four years down to 1944 the wife insisted on her husband's looking after her himself, and the husband complained of her unreasonable and sometimes violent conduct during that time. In particular, he alleged that she obliged him to read to her for long periods during the night and was unwilling to allow him sufficient sleep, with the result that his health suffered, his efficiency as an officer became impaired and married life between them became impossible.

Finnemore J., dismissed the petition on the ground that he found in the wife's conduct no deliberation, malignity or intention amounting to legal cruelty.

The husband appealed.

Salmon K.C. and *Roland Adams* for the husband. The fundamental error into which, it is submitted, Finnemore J.

C. A.

1948

SQUIRE
v.
SQUIRE.

fell was to regard it as essential to the husband's success that he should establish a malignant motive behind the conduct of his wife of which he complains. No such motive is necessary to constitute cruelty as between husband and wife. This wife was making extreme demands upon her husband. It is not suggested that she was insane. She must, therefore, be presumed to have realized the effect which those demands were having on him, namely, to damage his health and impair his efficiency as an officer. That was the natural consequence of what she was doing, and she must, therefore, be taken to have intended it and so to have been guilty of cruelty. [*Russell* v. *Russell* (1) referred to.] In considering the question of motive one must remember that the purpose of the law is not to punish the cruel spouse but to protect the victim. [*Hanbury* v. *Hanbury* (2) referred to.]

Three cases are particularly in point, of which the first is *Curtis* v. *Curtis* (3) where the relevant principles are stated. [*White* v. *White* (4) referred to.] In *Kirkman* v. *Kirkman* (5) Sir William Scott said that if the safety of a spouse "is "endangered by violent and disorderly affections of the mind, "it is the same, in its effects, as if it proceeded from "mere malignity alone ; it cannot be necessary, that, in order "to obtain the protection of the court, it should be made to "appear to proceed from malignity." Strong reliance is placed on those words for the husband here, for Finnemore J. has found in effect that the wife's conduct proceeded from "violent "and disorderly affections of the mind." [*Evans* v. *Evans* (6) referred to.] Again, in *Hadden* v. *Hadden* (7) Shearman J. said of a husband, "he had no intention of being cruel, but his "intentional acts amounted to cruelty." The test to be applied is purely objective : what, motive apart, is the effect of the respondent's conduct on the petitioner ? *Astle* v. *Astle* (8) is the high-water mark of the authorities which can be cited against the husband. [*Horton* v. *Horton* (9) referred to.] If a wife does acts which endanger her husband's health, it is no answer for her to say that she does those acts because she is a nasty person and they are the natural manifestations of her character. In *Horton* v. *Horton* (10) Bucknill J. said that mere conduct causing injury to health was not enough. In the present case, however, the wife's acts were directly aimed at the husband. Whatever may be the effect of nagging in constituting cruelty, this case goes far beyond nagging. If one spouse does acts which are prima facie cruel and which, as in the present case, take such a form as depriving a man of sleep or other necessity of life, and his health is broken down in consequence, the only possible defence to a charge of cruelty is that the spouse complained of did not know what he was doing and did not know that what he was doing was wrong. [*Brittle* v. *Brittle* (1) and *Meacher* v. *Meacher* (2) referred to.] The two crucial questions are: did the spouse do what is alleged and did he intend to do it? If yes, then it is immaterial that he did not in fact intend the consequences of his acts.

---

(1) [1897] A. C. 395.

(2) [1892] A. C. 322, 224.

(3) (1858) 1 Sw. & Tr. 192.

(4) (1859) 1 Sw. & Tr. 591, 592, 593.

(5) (1807) 1 Hag. Con. 409, 410.

(6) (1790) 1 Hag. Con. 35.

(7) The Times, Dec. 5, 1919.

(8) [1939] P. 415.

(9) [1940] P. 187.

(10) Ibid. 193.

The judgment of Dr. Lushington in *Dysart* v. *Dysart* (3) was referred to with approval in the case of *Curtis* v. *Curtis* (4), and Shearman J. adopted his words in *Hadden* v. *Hadden* (5). *Astle* v. *Astle* (6) merely decides that if a person is not capable of forming an intention to do an act he cannot be responsible for the consequences of the acts which he does.

[Tucker L.J. I can understand the judge saying that intention is necessary to constitute cruelty, but where is the authority for saying that malignity is essential?]

There is none. All that is necessary is to prove intention to do the acts which cause the injury. There is no authority for the proposition that there has to be a conscious motive to injure: the authorities establish the exact opposite. Once it is established that the wife intended to do these things which she has done, the husband must be entitled to protection. [*Boyd* v. *Boyd* (7) and *Edwards* v. *Edwards* (8) referred to.]

Theodore Turner K.C., R. J. A. Temple and *Elson Rees* for the wife. The question of malignity in the sense of evil intent is extremely material here. There may be cases where malignity of motive is not an essential element. In others it is, and this is one of those cases. The difference in the attitude of the court according to the type of case before it is well illustrated by *Astle* v. *Astle* (6). In almost all the cases referred to in argument for the husband there was brutal physical violence. Not much assistance is to be derived from generalizations uttered in reference to such facts. Their effect must be confined accordingly. This wife's motives and intention become relevant when conduct otherwise innocent is shown to have had such an effect on the health of the victim as might amount to cruelty. Then the state of mind of the party complained of must be examined. If it can be shown that in a particular case a certain act was done with the purpose of causing harm, that may be cruelty.

---

(1) [1947] 2 All E. R. 383.
(2) [1946] P. 216.
(3) (1844) 1 Rob. Ecc. 106, 116.
(4) 1 Sw. & Tr. 192, 213.
(5) The Times, Dec. 5, 1919.
(6) [1939] P. 415.
(7) (1938) 55 T. L. R. 3.
(8) (1947) 64 T. L. R. 61.

[TUCKER L.J. There is evidence that the wife actually compelled the husband to read to her.]

Acts by a wife which do not constitute threats to a husband's health from which he needs to be protected are not cruelty. [*Curtis* v. *Curtis* (1) and *Evans* v. *Evans* (2) referred to.] It was perfectly feasible for the husband to remove himself from such conduct of the wife as he regarded as wrong.

Again, there is another line of cases indicating that a spouse may withdraw from cohabitation and break up the home in circumstances neither rendering him or her liable to a suit for restitution of conjugal rights nor giving him or her the right to relief on the ground of cruelty. [*Russell* v. *Russell* (3) and *Beer* v. *Beer* (4) referred to.]

Finnemore J. has made findings of fact sufficient to indicate that there was never conduct which could be described as an attack on the husband, and that the conduct proved never amounted to more than possibly selfish and unreasonable demands made by the wife for her own purposes. The wife's making of such demands as lead to the impossibility of the marriage continuing still does not amount to cruelty. Moreover, the husband's conduct in face of his wife's demands was not forced on him. He acquiesced in them. That argument links up with the argument that the husband in fact condoned his wife's conduct of which he now complains. The position as to motive can be summed up thus: where an act is committed which in itself inflicts an injury, such as pricking or stabbing another with a knife, the motive behind the act is immaterial: it is obviously an act of cruelty. When, however, the nature of an act is such that it might or might not be cruel, when the act is not inherently cruel in the sense of inflicting physical injury, then motive does become material. It may be that, while a person must be taken to intend the natural and probable consequences of his acts, it was not a natural and probable consequence of this wife's conduct that the husband should react and acquiesce as he did and suffer in consequence. It is not as if the wife had deprived the husband of food, for example. There is here the interposition of his will in the matter. Whether or not motive is material depends upon the circumstances of each case. The whole of the conduct complained of here is of a type which does not constitute prima facie cruelty and which, therefore, requires investigation of motive. No evil motive has been established.

---

(1) 1 Sw. & Tr. 192.

(2) 1 Hag. Con. 35.

(3) [1897] A. C. 395.

(4) (1906) 22 T. L. R. 338.

Temple followed, submitting, on the facts, that the husband had condoned the alleged cruelty.

Salmon K.C. replied.

Cur. adv. vult.

May 14. The following judgments were read.

TUCKER L.J. Finnemore J. dismissed the husband's petition for divorce for his wife's cruelty on the ground that the conduct complained of was the consequence of the wife's illness and did not consist of deliberate malignant acts done with the intention of injuring the husband. The judge states the argument for the husband on this part of the case in these words: "If I "understand Mr. Salmon's argument, it is this, that it does not "matter if in fact the wife was making these demands on her "husband; she must be taken to have appreciated the effect "they had upon him, and intended the natural consequence "which is that he would suffer in health; she knew that night "by night she was requiring him to read to her, and she knew "or ought to have known, that he could not sleep; she "knew or ought to have known, therefore, that sooner or later "his health would break down under her conduct; and she was "responsible and therefore she was cruel. The only defence "to that—I am still taking the argument, as I understand it, "for the husband—would be insanity, and short of that, if she "knew what she was doing, she must be presumed to have "understood and intended the natural consequences."

Having discussed the evidence, he said: "I therefore come "to these conclusions on the facts: I think that the husband "was required to do this reading. I think the wife did make a "good many complaints. I am quite sure she was extremely "difficult to live with and finally impossible, situated as they "were, and I think further that the cause of all that was not a "desire to hurt her husband, to whom she was devoted, as he "was to her. I think she was an invalid, a very serious "invalid, suffering pain, weakness and psychological or mental "troubles, requiring many things to be done for her and unable "to settle down to have things done for her except by her "husband." Later on he says: "I do not think that she "ever deliberately set out, out of spite to her husband, to say: "'I am going to hurt him,' or, as I mentioned before: 'As I "'can't sleep he shan't.' I am quite satisfied about that." The judge then referred to *Astle* v. *Astle* (1), *Horton* v. *Horton* (2) and *Atkins* v. *Atkins* (3), and expressed his view of the law as follows: "All these cases emphasize, as I think the cases "before 1937 laid down, the fact that cruelty must be deliberate "malignant and intended—whatever precise words you like "to use." On this single ground he dismissed the petition.

In my opinion, the judge formed an erroneous view as to the effect of the authorities. One starts with the undisputed proposition that, generally speaking, a man is presumed to intend the natural and probable consequences of his acts. Is there any authority which decides that this is inapplicable to acts amounting to cruelty in matrimonial causes? No such case was cited to us. On the contrary, there is a considerable body of authority to the opposite effect.

It is to be observed that in the well known and much-quoted case of *Russell* v. *Russell* (4) it is nowhere suggested that motive is a necessary element in cruelty. More than eighty years earlier, in *Holden* v. *Holden* (5), Sir William Scott had used this language: "It is not necessary . . . . to inquire from what "motive such treatment proceeds; it may be from turbulent "passion, or sometimes from causes which are not inconsistent "with affection . . . If bitter waters are flowing it is not necessary "to inquire from what source they spring."

In *Kirkman* v. *Kirkman* (6) the same judge had previously observed: "If that safety is endangered by violent and disorderly affections of the mind, it is the same, in its effects, "as if it proceeded from mere malignity alone; it cannot be "necessary, that, in order to obtain the protection of the "court, it should be made to appear from malignity."

In *Hall* v. *Hall* (7) the Judge Ordinary said: "With danger "to the wife in view, the court does not hold its hand to inquire

---

(1) [1939] P. 415.
(2) [1940] P. 187.
(3) [1942] 2 All E. R. 637.
(4) [1897] A. C. 395.
(5) (1810) 1 Hag. Con. 453, 458.
(6) 1 Hag. Con. 409, 410.
(7) 3 Sw. & Tr. 349.

"into motives and causes. The sources of the husband's "conduct are, for the most part, immaterial. Thus, I have "no doubt that cruelty does not cease to be a cause of suit if it "proceeded from 'violent and disorderly affections,' as said in "one case, or from 'violence of disposition, want of moral "'control, or eccentricity" as said in another, or 'from a "'liability to become excited in controversy,' in the language "of a third; but madness, dementia, positive disease of the "mind, this is quite another matter."

In more modern times there is *Hadden* v. *Hadden* (1) in which Shearman J. said: "I do not question he had no "intention of being cruel but his intentional acts amounted "to cruelty."

Quite recently in a case of constructive desertion by a husband founded on his conduct which resulted in his wife's leaving the matrimonial home, Lord Merriman in *Edwards* v. *Edwards* (2) said: "I have mentioned the fact that this court, and, "indeed, many judges in the Division individually, have referred "over and over again to the principle that a man must be taken "to intend the natural consequences of his acts, and if it is a "natural consequence of a man's treatment of his wife that she "leaves him, it is a common place that, whatever he says in "words, he must be taken to intend that she will do so."

There is nothing in the cases referred to by Finnemore J. which conflicts with this line of authority. I need only refer to *Astle* v. *Astle* (3), which might at first sight appear to lend support to the judge's view; but on closer examination it will be seen that Henn Collins J. was considering a case of insanity where it was pleaded and found by the judge that during a certain period the respondent husband did not know the nature and quality of the acts committed by him and relied upon as cruelty. It was in considering the question whether these acts were intentional acts for which the husband was responsible that Henn Collins J. used the language which is summarized in the headnote. He said (4): "I have said that my conclusion "of fact is that the respondent did not know the nature and "quality of the acts which he committed in the year 1927, and, "if those acts stood alone, the petitioner could not get relief, "since in my judgment intention or malignity is an essential "ingredient in cruelty." Even in its restricted context I do not, however, agree with the use of the word "malignity."

---

(1) The Times, Dec. 5, 1919.
(2) 54 T. L. R. 62.
(3) [1939] P. 415.
(4) Ibid. 419, 420.

In my view, the law on this point cannot be more clearly expressed than in the brief statement of Shearman J. quoted above. It follows, therefore, that this case cannot be disposed of on the short ground that the wife's conduct was not actuated by spite but was due solely to her state of health. I must not, however, be understood to suggest that, in considering whether or not a case of cruelty has been established, the state of health of the parties is not a relevant matter to be taken into consideration together with all the other circumstances of the case, or that the same weight is to be attached to every act whether committed in sickness or in health, or that it is not the duty of each spouse to care for and tend and show forbearance towards the other in case of illness. As, in my view, the judge's decision cannot be supported on the ground upon which he based his judgment, it becomes necessary to examine the evidence and his findings of fact, if any, in relation thereto in order to decide whether or not a case of cruelty has been established by the husband.

The parties were married in 1932. The husband was a regular officer in the army. The matters complained of took place in India in the years 1940 to 1943, and are alleged to have continued till February, 1944 when the husband left his wife in the Isle of Wight, to which place he had taken her from India on account of her state of health. As the judge has found, he told her that he could no longer continue to live with her, but promised to reconsider his decision if she got better and mended her ways.

A number of incidents relied upon in the petition, were referred to in the evidence, and are discussed in the judgment, with regard to which the judge came to the conclusion that they did not in the circumstances of this case amount to cruelty. He expressed the view, with which I agree, that the case stands or falls on the question of sleep and nagging, that is, whether the wife, by her exacting demands and nagging, deprived her husband of sleep to such a degree that his health was impaired.

This matter is referred to in para. 8 of the petition which reads as follows : " From about the year 1940 to the year 1944 " at whatever place the [husband] and the [wife] might be " residing together the [wife] systematically tormented the " [husband] for nights on end by preventing him from sleeping " and demanding that he read to or converse with her and if he " showed signs of going to sleep made unreasonable demands "upon him that he should perform divers menial services for "her and/or stripped the clothes from his bed and/or moved "furniture about the room and/or switched electric lights on "in the room whereby the [husband] was deprived of sleep "and suffered in health consequentially." [His Lordship reviewed the evidence and continued :]

I have read and re-read the judge's judgment to see if I could obtain any assistance from his findings of fact on this vital issue, namely, whether the husband was in effect compelled by violence to submit to his wife's demands or whether he was throughout willingly ministering to her, or at any rate of his own free will yielding to her demands. There are passages in the judgment in which the judge describes him as a man of honour with a high sense of duty, doing all he could to get his wife better, which, taken by themselves, might indicate a finding of acquiescence on his part ; but, on the other hand, there is nothing to suggest that the judge rejected any part of his evidence or considered it exaggerated or regarded him as anything but a truthful and reliable witness. He accepted his evidence on the controversial issue as to the terms on which he finally parted from his wife in 1944. The only matter with regard to which the judge expressed any doubt was as to his present recollection concerning his motives in writing letters in affectionate terms to his wife at a time when she was behaving in the way complained of. Finnemore J.'s judgment must be read as a whole, and, when it is so read, it is, I think, plain that he was not directing his mind to this vital issue at all ; and, consequently, it is unhelpful and misleading to quote isolated passages from it out of their context.

In this court, therefore, I find myself without the benefit of the trial judge's findings directed to what I regard as the material issue in the case. In such circumstances, it is necessary carefully to consider whether we have sufficient material to enable us to determine the case ourselves or whether we are compelled to direct a new trial. Were it not for the fact that a study of the whole evidence leads me to the conclusion that the husband's evidence, corroborated as it was, was not seriously challenged, I should have felt compelled to the view that there must be a new trial. As I think, however, having regard to the way the case was conducted below, that there was really only one conclusion at which the judge could have arrived on this aspect of the case, I feel that we are in a position enabling us to grant the relief to which I think the husband, who

C. A.
1948
Squire
v.
Squire.
Tucker L.J.

was regarded by the judge as a truthful and reliable witness, is entitled on his unchallenged evidence coupled with the undisputed effect on his health of his wife's conduct. I would add that I have not lost sight of the letters of affection written by the husband to the wife during the material period, or to his delay in seeking a divorce on the grounds now relied upon.

As to these matters, I would firstly observe that, though they would no doubt afford material for cross-examination and were in fact so used on the issue of the husband's belief in the motives of his wife—they are of no value unless, so used, they result in discrediting the testimony of the husband in the passages which I have read. As that evidence was not in fact challenged, I feel difficulty in seeing how this material can now avail the wife. In any event, it does not seem to me that the existence and persistence of a deep affection for his wife is in any way inconsistent with the husband's evidence as to his wife's behaviour which was admittedly due to her neurotic condition. Nor do I think that failure to appreciate that the facts afforded him legal redress—even, as it appears, after taking some legal advice in India—can be held against the husband, seeing that a judge—erroneously as I think—came to the same conclusion on the same facts.

As to the issue of condonation, the judge's finding with regard to the final interview at Bembridge in February, 1944, makes it clear that there was no condonation subsequent to that date. The husband's conduct in not breaking up the home in India but in deciding, on medical advice, to bring his sick wife home to England for treatment before finally leaving her cannot, in my view, possibly be held to amount to condonation, especially in the light of the evidence that the conduct complained of on the part of the wife continued at Suez on the journey home.

For these reasons I think that this appeal succeeds, and that the husband is entitled to a decree nisi on the ground of the wife's cruelty.

Evershed L.J. In my judgment this appeal should succeed. As I read his judgment, the judge was of opinion that the absence of any spiteful or malignant intention on the part of the wife (as he found to have been the fact) was fatal to the husband's claim. I am unable to agree with this view of the law. I do not say that proof of such an intention may not be an important, or in some cases even an essential, consideration;

but, in the circumstances of the present case, for reasons which have been stated by TUCKER L.J. and which I need not repeat, I do not think that proof of such an intention was a requisite for the husband's success. It is conceded that the wife, though her mind and judgment were distracted by the illnesses from which she had suffered, was not insane. She remained at all material times responsible for her actions. If, therefore, her conduct to her husband was in fact cruel, she cannot, as it seems to me, escape its natural consequences.

Shorn, then, of what I hold to be the judge's misdirection in law, the case presents itself thus: upon a fair reading of his judgment has the judge found cruelty in fact? Has he, on the other hand, found voluntary submission or acquiescence on the husband's part? And if no certain answer can be given to these questions can this court, upon a perusal of the transcript of the evidence in the case, though without the advantage of seeing the witnesses in the witness box, itself reach a conclusion on the facts? Although the case has presented many difficulties, and although, on the view taken of the facts of the case by TUCKER L.J. (with which I agree), it is not necessary for our decision, my own view is, on the judgment as I read it, that the judge has found cruelty in fact and that he would, but for the view of the law which he took, upon his findings have pronounced—and in my judgment properly pronounced—in the husband's favour. Further, if I am wrong in this conclusion, at least there is, in my judgment, no finding by the judge sufficient to defeat the husband's claim; and, upon my reading of the evidence as a whole, I think, as I have already indicated, that the husband has made good his case for dissolution of his marriage.

I do not attempt any definition of the words "cruel" or "cruelty" save to say that the conduct complained of must at least satisfy the ordinary acceptation of those English words, and that, on well-settled authority, it must be such as to have injured in fact the complainant's mental or physical health or be such as to cause real apprehension of such injury. Upon the second qualification no difficulty arises. It has not been disputed before us that as a result of the wife's conduct the health of the husband was most seriously affected. As to the first qualification I do not forget the obligation of a spouse to take his or her partner in sickness and in health, for better or for worse; nor must I be thought to suggest that the substance of that obligation has lost any of its validity; but some limit

C. A.

1948

SQUIRE v. SQUIRE.

Evershed L.J.

must necessarily be set to it. If it be conceded, as in my view it must be, that in such a case as the present proof of malevolent design is unnecessary, all, or almost all, acts of cruelty not in fact malevolent must proceed from some sickness or disorder of the mind, though in many cases falling short of insanity. A husband or wife who by repeated acts of uncontrolled violence inflicts serious bodily injury upon his or her spouse; or who, by consciously depriving him or her of food, reduces him or her to a state of semi-starvation cannot, as it seems to me, escape the consequences of those acts by praying in aid the obligation of the marriage vow. In the present case the conduct complained of by the husband deprived him, time and again, of the sleep which is no less necessary than food for bodily refreshment. That the wife's conduct proceeded from her sickness may properly absolve her from the stigma which malignancy would have imposed; but the result, in my judgment, on the facts of the case (and, as I think, on the judge's findings) was beyond what the husband could be properly called upon to endure.

I turn first to the question which formed the subject of the main contest before us: has the judge held the husband to have voluntarily assented to the demands made upon him by his wife, and on that ground deprived himself of his right to relief? The point is wholly distinct from that of condonation, upon which the judge expressed no conclusion. What is said by Mr. Turner is in effect this: that, though the demands made by the wife upon her husband because of her illness were at times exacting in the extreme, nevertheless the husband, as a dutiful and loving husband, was held by the judge to have voluntarily and willingly submitted to those demands; and that if a husband, so voluntarily submitting himself, ruins his own health in the process, then (though he may be greatly deserving of sympathy) he cannot claim relief in these courts.

This passage of the judgment was most strongly relied on in support of this argument: "The picture I see, and I think "it is much more creditable to both of them, is of a wife "undoubtedly seriously ill, and a husband undoubtedly a man "of honour, with a high sense of duty, doing all that he could, "even at the expense of his own comfort and health, to get his "wife better. I do not doubt that ultimately he broke under the "strain, and the task proved for him too much, and I think for "that reason he has probably thought back to rather far-off "days." Bereft of the context, these sentences, no doubt, lend colour to the argument ; but in my judgment it is clear that, when read in their context, the words which I have quoted were not intended as a finding that the husband had willingly acquiesced in the course of conduct imposed upon him by his wife. The words represent the judge's conclusion, or part of his conclusion, upon the question, which he regarded as the main question, namely, whether the wife was acting spitefully or maliciously towards her husband ; and, more particularly in that regard, whether the judge could accept the husband's evidence given at the trial that, notwithstanding his contemporary letters, he had thought so at the time.

The material part of the judgment comes just before the passage above quoted : " However that may be, I come back " to the main question. Colonel Squire stated in his evidence " in one place that he thought his wife was doing what she did, " insisting on his reading all night, not just because she was " ill, but, as he put it, ' she deliberately and maliciously and " ' sadistically stopped me from sleeping.' He says it was " quite irrational if she did that, but that is the view he " adopts, that it is not merely a case of a woman suffering from " insomnia." After some reference to the facts the judge continued : " I think if a person is ill, and says in effect, ' Well, " ' I can't sleep, so you shan't,' that might well be a case of " cruelty, and that is the case which the husband made, and " I have quoted what he said about it. But I am not at all " sure that that was the view he took at the time, although " I do not doubt for a moment that he takes it quite honestly " now." The judge then passes to a consideration of the correspondence, including, particularly, the letter written in May, 1941, in which the husband urged his wife in the most affectionate terms, and in spite of her exactions from which he had very recently suffered, to join him at his station. " Now " it may be," the judgment proceeds, " as the husband has " said, after this interval of time, that these letters were really " not genuine letters—that is to say, that he did not mean " the terms of affection which he used ; they were just written, " he said, to help his wife to get better, but that he himself, " even at that time, had already ceased to love her, and was " already coming to the conclusion that he would have to end " the marriage. Frankly, I doubt that." Then follows the passage earlier quoted upon which Mr. Turner so strongly relies. I have quoted at some length from this part of the judgment, for much, as it seems to me, turns upon it ; but, when the whole of it is read, it is to my mind clear that the material sentences cannot be construed as a finding of such acquiescence on the husband's part as defeats his claim. In my judgment, these sentences amount to no more than this: a rejection (in this one instance) of the husband's evidence that, at the time when he wrote the letters, he thought that his wife was actuated by malice, and a finding that, in writing the letters, the husband was prompted by duty and affection, hoping and believing that his wife might recover from the sickness which was responsible for her actions.

I am confirmed in this opinion by other considerations, and first, by the whole tenor of the judgment. As I have already stated, the judge plainly regarded the main question for his decision, aye or no, was the wife acting malevolently. At the beginning of his judgment the judge posed for himself this dilemma: either he must refuse relief to the husband or he must " fix fairly and squarely on the shoulders of the wife " the matrimonial offence of cruelty notwithstanding that her conduct emanated from her illness. If " acquiescence," in the sense for which Mr. Turner has contended, was the answer to the husband's claim, and the judge so intended to find, then malevolence was not the main issue or indeed a necessary issue at all, and he put to himself a choice and a difficulty which did not really arise. Nor was it necessary for him to examine, as he did, the various incidents relied upon, and to reject some of them as (apart from malignity) not amounting to cruelty. As I read the whole judgment, I think it follows that (apart from the possibility of condonation, with which he did not deal) had he either found malice in fact on the part of the wife or held malice to be unnecessary as a matter of law, he would have pronounced for the husband.

A second matter which supports the view which I have formed is that acquiescence as distinct from condonation was not pleaded as a defence; nor, in my judgment, was it ever really put to the husband in cross-examination.

There is a third consideration going to the root of the suggested defence, which, if not, perhaps, directly bearing upon the terms of the judgment, may here be mentioned: in putting the point before us Mr. Turner suggested the analogy of a claim for cruelty based on acts of sexual perversion and a defence of acquiescence in the sense of voluntary participation in those acts. I am not, however, satisfied, of the truth of the analogy: in such a case refusal to submit does not present difficulties with which a husband in circumstances like those in the present case is faced. For what were the choices before the husband, situated as he was with his wife in India in war-time ? He might have retaliated with violence—or done so to a greater extent than he did : for it was proved that on some occasions he did strike her. The choice is not one likely to commend itself to a husband with a sense of duty and propriety, or to a husband who loved his wife. He might have deserted her in India ; but was such a course reasonably practicable for him—particularly when regard is had to the demands which she made upon him and the kind of offensive telegrams which she sent to him when away from him ? The only remaining course open to the husband was to submit in one form or another until they could both leave India. In a case of cruelty such as the present (for I assume for this purpose that the wife's acts were cruel) a spouse may in practice have no choice but to submit until further submission becomes impossible ; but in my judgment it would not be right to say that such a submission amounted to acquiescence so as to defeat the claim for relief. I conclude, therefore, that there is in the judgment no finding of acquiescence as Mr. Turner contended.

There remains the question : has the judge found cruelty in fact ? As already indicated, once the suggested finding of acquiescence is out of the way, an answer to the question is not, on the view of the facts which I take, strictly necessary ; but were it necessary I should be prepared to hold that he has. In my judgment, indeed, the answer really follows by necessary inference from what has been already said in reference to the general form of the judgment—namely, the dilemma posed at the beginning, the formulation of the issue of malice as the main question to be determined, and the judge's examination of the various incidents complained of and the rejection of some of them (such as that of upsetting the wireless) as insufficient to amount in any case to cruelty. Mr. Turner referred us to the well-known judgments of Lord Stowell in *Evans* v. *Evans* (1) (to which I refer again later), and it was argued that the language of the judge fell short of a finding of acts imposed upon the husband as distinct from more requests made to him. As Mr. Salmon pointed out, however, the material word used almost exclusively by the judge in reference to the calls made upon her husband by the wife was "require"—a word at least more consistent with command than request. Moreover, in a context referring to such an incident as the so-called axe incident, the word must have imported compulsion. In any case, as it seems to me, once the alleged finding of acquiescence is out of the way, the significance of the search for words importing compulsion is largely disposed of. I shall not travel through the whole judgment; but the conclusion is thus stated: "I think, considering them "as well as I can, that those letters are consistent with the "attitude of a man who has faced a desperately difficult and "unhappy situation as a husband should, and realized that it "was not really his wife's fault, but was the result of her "desperate ill health and insomnia. I therefore come to these "conclusions on the facts. I think that the husband was "required to do this reading. I think his wife did make a "good many complaints. I am quite sure she was extremely "difficult to live with, and finally impossible, situated as they "were, and I think further that the cause of all that was not a "desire to hurt her husband, to whom she was devoted, as he "was to her. I think she was an invalid, a very serious invalid, "suffering pain, weakness, and psychological or mental trouble "requiring many things to be done for her and unable to settle "down to have things done for her except by her husband." In my view, the judge intended to find, and did find, conduct on the part of the wife amounting to cruelty in fact, and such that, had it not been for his finding and conclusion of law in regard to malice, and apart from condonation (with which he did not deal), he would have held the husband entitled to a decree.

---

(1) 1 Hag. Con. 35.

If there be no sufficient finding of cruelty in fact, however, then, at least, in my view, there is no finding of fact sufficient to negative cruelty. This conclusion follows, and follows, in my view, a fortiori, from what I have already said upon the whole form and tenor of the judgment. If the judge intended to find nothing which, apart from malignity, would amount to cruelty in fact, it was not only unnecessary to deal with the question of malignity, but inconsistent and senseless to treat it as being the main issue in the case; and it was pointless to refer to certain of the incidents alleged, as distinct from others, and to find as regards them that they did not in any case fall within the meaning of the word "cruel." Equally unnecessary and pointless, on this hypothesis, was this formulation of the case in the judgment: "Life having become impossible between them in "that sense, was that because the wife was treating her husband "cruelly, or was it that her illness and ill-health became so "bad and she needed so much care, because of her illness, and "made so many demands on her husband, that he could no "longer meet them without breaking down himself? If I "understand Mr. Salmon's argument, it is this, that it does not "matter; if in fact the wife was making these demands on her "husband, she must be taken to have appreciated the effect "they had upon him, and intended the natural consequence, "which is that he would suffer in health. She knew that night "by night she was requiring him to read to her, and she knew, "or ought to have known, that he could not sleep; and she "knew, or ought to have known, therefore, that sooner or later "his health would break down under her conduct; and she "was responsible, and therefore she was cruel." The judge thereupon proceeded to a discussion of what he calls "the real "difficulty" and "the main question" in the case, namely, the issue of malignity, and to a citation of the various authorities upon that point. I have already referred to the statement of conclusion. I cite finally two further passages: first, "In the "result, as I say, I have come to this conclusion, that this "was a case of a woman very seriously ill and in great pain, "unable to sleep, making very wide demands on her husband, "the only member of her family she had, demands which "became from a practical point of view impossible for him to "comply with indefinitely. I do not think that she ever "deliberately set out, out of spite to her husband, to say 'I am "'going to hurt him,' or, as I mentioned before, 'As I can't "'sleep he shan't'; I am quite satisfied about that. I am "satisfied that because of the illness life became impossible "for them. Now, is that cruelty?" Second, "I think in a "case where on the facts the court is satisfied that there was "no deliberately adopted intention (as I find in this case) "but owing to illness, and in the course of illness and arising "out of illness, there was conduct and there were demands "made upon the other partner to the marriage which were "heavy, and became impossible, you do not establish cruelty."

For these reasons I find it impossible to interpret the judgment as containing such findings as negative cruelty in fact. If, therefore, the true view is that there are in the judgment no findings of fact one way or the other, it becomes the duty of the court, if it can, to reach its own conclusion of fact upon all the evidence, assisted by the findings of the judge, so far as they go. Upon this aspect of the case, I have had the advantage of reading the judgment of Tucker L.J.,

C. A.
1948
SQUIRE
v.
SQUIRE.
Evershed L.J.

with which I find myself in entire agreement. In approaching the evidence, which my Lord has fully analysed, it is important to have in mind (as pointed out by him)that the judge accepted the husband as a truthful and candid witness, plainly preferring —and I am not surprised that he did prefer—the husband's evidence to that of the wife's. The judge's finding on the issue of what occurred when the husband left the wife in February, 1944, strikingly illustrates, in my view, the reliance which can be placed upon the husband's testimony.

It is, no doubt, a point of substance that, until the presentation of the petition, the husband does not appear to have regarded himself as a victim of cruelty, and had, indeed, suggested that his wife should herself bring proceedings for divorce, based on his desertion since February, 1944; and further, that the husband, having sought advice in India in 1942, was not then advised that he had any case for dissolution of his marriage on the ground of cruelty or otherwise; but, as it seems to me, the weight and importance of these matters goes rather to the credibility of the husband's testimony; and it is clear that the judge accepted his evidence of his wife's conduct as true. Once it is established that the various acts alleged did occur in fact, it cannot matter that it may not have occurred to the husband that they constituted cruelty or that a lawyer in India in 1942 advised that they did not. The facts having been established, it was for Finnemore J. to decide, and it is now for this court to decide, what are their legal consequences.

I bear in mind the passage from Lord Stowell's judgment in *Evans* v. *Evans* (1) to which I have already referred. In my view, the conduct proved far exceeds "mere austerity of temper, "petulance of manners, rudeness of language, a want of civil "attention and accommodation, even occasional sallies of "passion [which] if they do not threaten bodily harm, do not "mount to legal cruelty; they are high moral offences in the "marriage-state undoubtedly, not innocent surely in any state "of life, but still they are not that cruelty against which the "law can relieve. Under such misconduct of either of the "parties, for it may exist on the one side as well as on the "other, the suffering party must bear in some degree the "consequences of an injudicious connexion; must subdue by "decent resistance or by prudent conciliation."

It is not seldom emphasized that every case must depend upon its own peculiar facts; and that observation is particularly applicable to a case of cruelty such as the present, depending upon the conclusion to be derived from a consideration of conduct extending over a period of years, during which a number of specific instances of varying significance stand against and illustrate a general background. In my judgment, it is clearly proved that over that period the wife who suffered from insomnia at night (though not even able to sleep by day) and serious nervous distractions, including a good deal of self-pity as a result of many illnesses, demanded of her husband an altogether extraordinary degree of ministration; and, as part of her demands, time and again, refused to allow him to sleep at all until three or four o'clock in the morning, or, at times, at all throughout the night, so that when, from natural weariness, he went to sleep, she roused him by such means as pulling off his clothes, moving furniture and turning on taps. Of such conduct the "axe" incident corroborated by the witness, Mrs. McVean, and the incident in the boarding house, when the husband sought to rest in a chair in the public lounge and was there pursued and aroused by his wife in such manner that they were both requested by the proprietor to leave, are notable illustrations. I observe that, as regards these acts, the wife in her evidence did not attempt to say, as I understand her, that the husband was voluntarily ministering to her, but denied the facts or any recollection of them. To this must be added "nagging" of an intemperate kind, illustrated by the telegrams already referred to and, more particularly, by what occurred at Suez, when, according to the evidence of an independent witness, a married woman, the wife's behaviour far into the night was such as to provoke the witness's husband to say that if she were his wife he would have murdered her. The result was, beyond doubt, seriously to injure the husband's health, and to render it, as the doctor who gave evidence said and the judge found, "impossible" for the husband to live longer with his wife. I therefore think that, if there was no finding by the judge of cruelty in fact, such cruelty is established by the evidence. The defence of condonation, I agree with TUCKER L.J., for the reasons which he has given, is not established. I would allow the appeal, and grant a decree nisi on the petition.

---

(1) 1 Hag. Con. 35, 38.

HODSON J.: Unfortunately at the trial the case appears to have been so conducted that the attention of the judge was distracted from the true issue, namely, whether or not cruelty had been established on the evidence apart from the question whether or not the wife had the intention of being cruel. I agree that the judgment appealed from is to a great extent vitiated by this distraction, and that it is necessary to examine the evidence and the judge's findings of fact in relation to it in order to decide whether a case of cruelty has been proved. I also agree that a vital issue in the case is whether the husband was compelled to submit to his wife's demands or whether he was willingly ministering to her, impelled by natural sympathy and affection and the sense of duty to tend her in her sickness. It is true that, in so far as the judgment in favour of the wife depends on a finding that there was no intention on her part to injure her husband, it appears that the existence of compulsion does not arise for consideration, and it may fairly be argued that absence of motive does not arise except upon the view that the evidence of the husband was accepted as establishing a case of cruelty.

I have, however, considered the judgment to the best of my ability and have formed the opinion that, no intention to injure having been found, the case was also determined by the judge on the alternative basis that, apart from the question of intention, no cruelty has been proved. It is at this point that I respectfully dissent from my Lords. I recognize the danger of taking isolated parts of his judgment in order to support this view, but I am, nevertheless, of opinion that, whenever in his judgment findings of fact appear, they are really consistent only with a finding that there were no acts of cruelty and no compulsion at any time. I do not think that these findings are inextricably confused with the judge's misconception as to intention. There are, indeed, references in the judgment to "another aspect of the case, namely, whether the wife was "actuated by spite," which show that the judge was looking at the case from more than one point of view. [His Lordship read passages from the judgment and the correspondence, and continued :] It is true that the repeated use of the word "require" approximates to a finding of compulsion, but the judge in my opinion rightly attached great importance to letters written by the husband to the wife during the relevant period, including as they did a request by him to her to join him at Peshawar because he realized that she was unhappy at Murree, as well as for financial reasons. These letters, if genuine, as they were found to be notwithstanding the husband's denial, throw a strong light on the view which the husband took of his wife's conduct at the time, and go some way towards negativing the husband's case that he was acting under compulsion. As to his attitude at the time, the observation of the judge of the Consistory Court in *Westmeath* v. *Westmeath* (1) cited in *Curtis* v. *Curtis* (2) are material. He says: "If they are not resented as injuries at the time, a state of "things intervenes, which either detracts from the weight of "particular evidence, when brought forward at a subsequent "period; or may introduce quite another view of the relative "situation of the parties." If he had then resented the exacting requirements of his invalid wife, he could, at least, have refrained from encouraging her to join him. Moreover, his forbearance from making allegations of cruelty until many years after the events complained of, and only when his efforts to induce his wife to divorce him on the footing that he had deserted her without any cause had failed, is hardly consistent with the resentment which he now alleges.

Immediately after referring to the letters, the judgment goes on to refer to the picture of the parties as of a wife seriously ill and a husband doing all that he could, even at the expense of his own comfort and health, to get his wife better. This passage appears to summarize the general view which the judge took of the whole case.

The findings of fact to which I have referred lead me to consider whether the evidence can support them, having regard to the view expressed in the House of Lords in *Watt* v. *Thomas* (3), as to the weight to be attached to the finding of a trial judge who has seen and heard the witnesses. Lord Thankerton said (4): "It will hardly be disputed that consistorial cases form a class in which it is generally most important "to see and hear the witnesses, and particularly the spouses "themselves; and, further, within that class, cases of alleged "cruelty will afford an even stronger example of such an "advantage. Normally the cruelty is alleged to have "occurred within the family establishment, and the physique, "temperament, standard of culture, habits of verbal expression "and of action, and the interaction between the spouses in their "daily life cannot be adequately judged except by seeing and "hearing them in the witness box. The law has no footrule "by which to measure the personalities of the spouses."

---

(1) (1826) 2 Hag. Ecc. Sup. 1, 52.
(2) 1 Sw. & Tr. 192, 197.
(3) [1947] A. C. 484.
(4) Ibid. 488.

C. A.
1948
Squire
v.
Squire.
Hodson J.

Looking at the established acts of the wife here against the background of the special facts of this case, including what is, surely, not an uncommon feature of married life, namely, one ailing spouse making exacting and unreasonable demands upon the other partner, and demands which deprive the other of sleep from time to time, I am unable for myself to form the view that the judge came to an erroneous decision on the facts. Acts between spouses must necessarily be examined in relation to the obligation of each to accept the other for better or for worse, in sickness or in health.

In a recent case, *Buchler* v. *Buchler* (1), this court had to consider the nature of conduct short of cruelty which may justify one spouse in refusing to live with the other. Expressions used in that case, so far as they are of general application, seem to me to apply a fortiori to a case where cruelty itself is alleged. In discussing conduct not amounting to cruelty, Asquith L.J. said (2): "It must exceed in gravity such "behaviour, vexatious and trying though it may be, as every "spouse bargains to endure when accepting the other 'for "'better or for worse.' The ordinary wear and tear of conjugal "life does not in itself suffice." For my part, I have come to the conclusion that the finding in favour of the wife ought not to be disturbed, and that this appeal should be dismissed.

Appeal allowed.

Solicitors for the husband: *Lewis & Lewis & Gisborne & Co.*
Solicitors for the wife: *Preston, Lane-Claypon & O'Kelly.*

(1) [1947] P. 25. (2) Ibid. 45.

R. C. C.

C. A.

CHAPLIN *v.* CHAPLIN.

1948
July 2.
Tucker,
Bucknill and
Somervell L.JJ.

Husband and wife—Nullity—Limitation—Alleged pregnancy at date of marriage—Alleged fraudulent concealment—Petition more than a year after marriage—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 57), *s.* 7, *sub-s.* 1 (ii.)

By s. 7, sub-s. 1 of the Matrimonial Causes Act, 1937, it is a ground for a decree of nullity that a wife was, at the date of her marriage to the petitioner, unbeknown to him pregnant by another man: "Provided that . . . . (ii.) . . . . proceedings were "instituted within a year from the date of the marriage . . . ."

That proviso is not in the nature of a statute of limitation, and is accordingly not subject to the equitable principle that where a man is in ignorance of his rights owing to their fraudulent concealment by another a period of limitation begins to run against him only from the date of his discovery of the fraud.

Where, therefore, a wife gave birth to a child seven months after the date of her marriage, and the husband, who had been on military service at the time of the birth, did not discover until more than a year later that the child had appeared at birth to be a nine-month child, and subsequently presented a petition for a decree of nullity,

Held, that the petition was out of time and must be dismissed.

APPEAL from Hodson J.

The appellant husband and the respondent, his wife, were married on October 31, 1944. On May 30, 1945, the wife gave birth to a child. The husband, who was on military service abroad, became aware that his wife was pregnant as the result of a letter which she sent him on May 15, 1945, in which she stated that the child would be coming before its time because of a fright and a fall which she had suffered. On June 14, 1945, after the birth, she wrote again, referring in more detail to her accident and fright. In August, 1945, the husband came home on leave and his suspicions were aroused, but a neighbour who was called in confirmed the wife's story of the fall. The husband accepted the explanation, and the spouses lived together until July, 1946, when the wife left him. On September 20, 1945, he made inquiries of the doctor who had attended her in her confinement, and was informed by the doctor that the child at its birth on May 30, 1945, was apparently a nine-month child. The petition was still not filed until March 8, 1947.

Hodson J. dismissed the petition, and the husband now appealed.

Fairweather for the husband.

The wife was not represented and did not appear.

The argument for the husband is summarized in the judgment of TUCKER L.J.

TUCKER L.J. It is to be observed that s. 7, sub-s. 2, does not apply in cases like the present, arising under s. 7, sub-s. 1 (*d*) of the Matrimonial Causes Act, 1937 (1). The present petition

---

(1) Matrimonial Causes Act, 1937, s. 7, sub-s. 1: "In addition "to any other grounds on which a "marriage is by law void or

C. A.
1948

CHAPLIN
v.
CHAPLIN.

Tucker L.J.

was presented on March 8, 1947. It is clear that on the face of it more than a year had expired from the date of the marriage, and, therefore, unless some good reason can be shown to the contrary, the case comes within proviso (ii.) to s. 7, sub-s. 1. The birth on May 30, 1945, meant a premature birth if the husband was the father.

The judge held that it was impossible to say that the husband had not discovered the existence of the grounds for the decree until a date subsequent to his return on leave in August, 1945. He said: " On these facts the husband's suspicions having " been aroused when the child was born and inquiries having " been made by him to confirm those suspicions very shortly " after his wife left him, it is, in my opinion, impossible to say " that he did not discover the existence of the grounds for a " decree until after the later date "—that is to say, after the wife had left him—" It may be that his affection for his wife " " induced him to remain with her at first and to give her the " benefit of any doubt there might be, but the result is that he " has failed to prove that marital intercourse has not taken place " since the discovery of the existence of grounds for a decree." I do not think it necessary to express any view with regard to that part of the case, for it is clear that the husband is debarred from bringing these proceedings under s. 7 by reason of the fact

" voidable, a marriage shall be " voidable on the ground: " (*a*) that the marriage has not " been consummated owing to the " wilful refusal of the respondent " to consummate the marriage; " or (*b*) that either party to the " marriage was at the time of the " marriage of unsound mind or a " mental defective within the " meaning of the Mental Deficiency Acts, 1913 to 1927, or " subject to recurrent fits of insanity or epilepsy; or (*c*) that " the respondent was at the time " of the marriage suffering from " venereal disease in a communicable form; or (*d*) that the " respondent was at the time of " the marriage pregnant by some " person other than the petitioner: " Provided that, in the cases " specified in paragraphs (*b*), (*c*) " and (*d*) of this sub-section, the " court shall not grant a decree " unless it is satisfied: (i.) that " the petitioner was at the time of " the marriage ignorant of the " facts alleged; (ii.) that proceedings were instituted within a " year from the date of the marriage; and (iii.) that marital " intercourse with the consent of " the petitioner has not taken " place since the discovery by the " petitioner of the existence of the " grounds for a decree."

Sub-section 2: " Any child " born of a marriage avoided pursuant to paragraphs (*b*) or (*c*) of " the last foregoing sub-section " shall be a legitimate child of the " parties thereto notwithstanding " that the marriage is so avoided."

that considerably more than a year has passed since the date of the marriage.

The argument presented by Mr. Fairweather with a view to overcoming this difficulty is as follows; he says that in effect proviso (ii.) to s. 7, sub-s. 1, is in the nature of a statute of limitation, that equitable principles should be applied to the interpretation of such a statute, and, accordingly, that, if it be established that the husband's rights in this matter have been concealed by the fraud of the wife, the period provided for in the sub-section should be extended until the discovery of the fraud. Counsel concedes that this particular section does not come within s. 26 of the Limitation Act, 1939, which concerns fraud or mistake, for that section only concerns actions for which the period of limitation is prescribed by that Act, and that Act does not prescribe any period of limitation with regard to this matter. Section 26 of the Limitation Act, 1939, in the case of actions for which periods of limitation are prescribed by the Act, provides for the extension of the period where an action is based upon fraud, where the right of action was concealed by the fraud, or where the action is for relief in consequence of mistake. In support of his submission counsel referred to the Limitation (Enemies and War Prisoners) Act, 1945, which provides, in s. 1, sub-s. 1: "If at any time before "the expiration of the period prescribed by any statute of "limitation for the bringing of any action any person who would "have been a necessary party to that action if it had been "brought was an enemy or was detained in enemy territory, "the said period shall be deemed not to have run while the said "person was an enemy or was so detained, and shall in no case "expire before the end of twelve months from the date when he "ceased to be an enemy or to be so detained, or from the date "of the passing of this Act, whichever is the later." By s. 2, for the purpose of the Act "'statute of limitation' means any "of the following enactments, that is to say: the Limitation "Act, 1939 . . ." There follow a number of other enactments, including the Copyright Act, 1911, s. 10 the Moneylenders Act, 1927, s. 13, sub-s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, and, finally, s. 7, sub-s. 1 of the Matrimonial Causes Act, 1937.

The mere fact that Parliament has thought fit, in the special case of persons who are enemies or were detained in enemy territory, to provide that some extension should be given with regard to bringing proceedings under s. 7, sub-s. 1, does not,

C. A.
1948

CHAPLIN
v.
CHAPLIN.

Tucker L.J.

in my view, bind us to construe the section as meaning that Parliament has intended to empower the courts, in applying the proviso, to apply equitable principles, with the result that in many cases this period of twelve months would inevitably be considerably extended. This case cannot be determined merely according to whether or not the proviso is for some purposes a statute of limitation. The question turns on the construction of s. 7 as a whole. Regard must be had to the subject with which it is concerned, namely, proceedings to alter the status of the parties and proceedings the result of which will affect the children of the marriage ; and also to the circumstances in which the marriage may be rendered voidable under the section, namely, where one of the parties is of unsound mind or mentally defective or subject to fits of recurrent insanity or epilepsy ; where, at the time of the marriage, the respondent was suffering from venereal disease in a communicable form ; and where there is pregnancy by another man at the date of the marriage. In all those cases Parliament has thought fit to prescribe in the clearest possible language that the court shall not grant a decree unless it is satisfied that proceedings were instituted within a year of the date of the marriage. It would be quite wrong for this court to extend that period in a way which might, in some cases, involve bastardizing children who had been born of the union which it was sought to avoid. The mere fact that there may be, and still are, cases in which marriage is void or voidable on grounds other than those specified in this section, or the voidness or avoidance of which may involve children who have been born of that union, namely, cases of bigamy and insanity properly so called—seems to be no reason why we, by extending the interpretation of this Act, should enlarge the area of cases in which consequences of that kind may result. It seems to me, on the clear wording of this section, that the husband is out of court, and that the appeal on that ground must fail.

BUCKNILL L.J. I agree, for the reasons given by my Lord.

SOMERVELL L.J. I agree, and only wish to refer to the question of construction. If it is desired to lay down a period of limitation after the expiry of which actions cannot be brought, there are, broadly, two schemes by which the period can be delimited : one is to take a fixed period as from a certain date, irrespective of whether the plaintiff or person seeking relief has, or could have, knowledge of his rights. The other scheme is to make the period dependent on and run from the date at which the plaintiff or person seeking relief could, or should, have had knowledge of his rights. Those are the two broad principles, and they are very familiar. They can be combined, and in the Act of 1937 Parliament might have provided that proceedings must be instituted within a year from the date of the marriage or within, say, six months from the discovery by the petitioner of the existence of the grounds in question, whichever period is the longer. Counsel for the husband is asking us to imply into s. 7, sub-s. 1, a provision based on what I have described as the second broad method by which the period can be delimited. I can see no reason why we should imply any such provision, and several reasons against it.

Reference has been made by my Brother to the Limitation Act, 1939. I think that study of the material sections of that Act reinforces the reasons which he has given for arriving at his conclusion. In the first part of that Act certain periods of limitation are set out, and, in accordance with his argument, I think that Mr. Fairweather would have said that the equitable principle as to fraud would have had to be applied to them even if there had been no mention of it in the Act. In fact, however, that extension on the ground of concealment of fraud is specifically provided for in s. 26 of the Act of 1939. There is no such provision in this Act of 1937, and it seems to me quite impossible to imply it, even if the equitable principle had any application (and I rather doubt whether it has) to the subject matter with which we are concerned in this appeal. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the husband: *Duthie, Hart & Duthie.*

R. C. C.

Followed. Bown v. B. [1949] P. 91

GUNNER v. GUNNER AND STIRLING.

1948
May 13, 14.
Wallington J.

Divorce — Variation of settlement — Husband petitioner's life policy in name of respondent wife—Assurance for benefit and separate use of assured's wife absolutely—Whether a settlement and therefore variable—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 192—*Married Women's Property Act,* 1882 (45 *&* 46 *Vict., c.* 75), *s.* 11.

By the terms of an insurance policy effected by a husband upon his life the payees were identified as "the person or persons

1948

GUNNER
v.
GUNNER
AND
STIRLING.

"entitled under the Married Women's Property Act, 1882, to "receive the policy moneys"; and the insurance was effected under the provisions of that Act for the benefit and separate use of the wife of the assured absolutely. The marriage was subsequently dissolved because of the wife's adultery, and the husband sought to vary the provisions of the policy.

Held that a trust had been created whereby the wife as main beneficiary was given an immediate vested interest in the rights under the policy; that the policy had been effected to make provision for the wife in her character of a wife; and that the court had the necessary jurisdiction under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, to vary the policy in question as being a post-nuptial settlement. A transaction might be considered as a settlement, and come within the jurisdiction conferred by the section, although it might fall short of the strict requirements of the Chancery Court when that court had to consider whether in certain circumstances a settlement existed.

APPLICATION by a husband petitioner for variation of a post-nuptial settlement.

The following statement of facts is taken from the judgment.

The parties, who were married on September 20, 1935, lived together for some time and there were three children of the marriage. In April, 1947, the husband petitioned for the dissolution of the marriage on the ground of his wife's adultery with the co-respondent Edgar Stirling from March 29, 1947, onwards. That suit was heard in October, 1947, and a decree nisi was pronounced, which was made absolute on December 1, 1947. On February 9, 1944, the husband took out a policy of insurance on his life with the Commercial Union Assurance Company Ld., taking advantage of the provisions in s. 11 of the Married Women's Property Act, 1882; by that policy, subject to the payment of premiums, the sum of 5,000*l*. had to be paid to the payees under the policy. The schedule to the policy identified the payees as "the person or persons entitled "under the Married Women's Property Act, 1882, to receive "the policy moneys," and the event assured against was the death of the life assured. The following special condition was set out in the policy in the appropriate space: "This insurance "is effected under the provisions of the Married Women's "Property Act, 1882, for the benefit and separate use of the "assured's wife Winifred Agnes Gunner formerly Watkinson "absolutely."

After the decree had been made absolute the husband, on March 18, 1948, gave notice and set down for hearing before the registrar an application to vary the policy, which was described in the notice of application as "a post-nuptial settle-"ment made on the ninth day of February, 1944, by the "petitioner upon the respondent . . . . effected under the Married "Women's Property Act, 1882," by "extinguishing all the "interest of the respondent in the said policy absolutely." This application came before Mr. Registrar Long on May 5, 1948, and he signed a report in which he said that he was "referring this direct to the judge with the approval of both "sides for the determination of one question: Can the policy "be regarded as a settlement at all?" He ventured to request that, should it be so regarded, the judge should deal with the matter finally to save a further hearing and report.

By an amendment on the second day of the hearing, pursuant to the order of WALLINGTON J. application was made to vary the policy by deleting in the special condition of the policy all words after "benefit," and substituting therefor the following words—"of such of the existing children of the assured, "namely . . . ., as shall survive him and if more than one in "equal shares."

Maurice Berkeley and *J. L. S. Hale* for the petitioner. The effect of the policy is to create a trust in favour of the wife absolute on the death of the husband and it gives her an immediate vested interest in the policy moneys. It is conceded that it is not a settlement in the strict sense, but it is clear on the authorities that a settlement within the meaning of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, does not mean a settlement in the strict sense. A liberal construction should be given. Where annual sums are still payable by a donor at the date of the decree and the donee's interest has not fallen into possession and enjoyment the court can and should regard the document in question as a settlement. (Counsel referred to those authorities which are summarized in the judgment at p. 84.) Certain cases are to be distinguished. In *Chalmers* v. *Chalmers* (1) there was an absolute and completed assignment. *Hubbard* (*otherwise Rogers*) v. *Hubbard* (2) was an assignment of a leasehold house to trustees in trust for the wife. Her interest had vested in possession and she was in full enjoyment of the beneficial interest before decree. It was, in fact, a completed gift. *Brown* v. *Brown* (3) could be similarly distinguished. In these three cases in which the court refused to intervene the donee's

(1) (1892) 68 L. T. 28.
(2) [1901] P. 157.
(3) [1937] P. 7.

1948

GUNNER
v.
GUNNER
AND
STIRLING.

interest had vested in possession and the donor's obligations in connexion with the disposition had been fulfilled well before the decree of divorce.

The object of the policy was to provide for the wife as a wife and is expressed to be under the provisions of the Married Women's Property Act, 1882. The husband would not have made the provision for her in the event of his death had he known that the marriage was to be dissolved because of her adultery. The object of s. 192 of the Judicature Act, 1925 (1), is to enable the court to make special arrangements in cases where a spouse, on whom a settlement was made in his or her character as a spouse, has been found guilty of a matrimonial offence and divorced.

J. A. Brightman for the respondent. The policy is a gift and the wife's knowledge of it is immaterial. It is not a settlement. Neither the applicant nor any other person except the respondent has any beneficial interest whatever in the policy: see *Cousins* v. *Sun Life Assurance Society* (2). The respondent could at any time have demanded that the policy be transferred out of the name of the applicant as trustee into the name of the respondent as sole beneficiary. A disposition is not a settlement within the meaning of s. 192, if the one spouse takes an immediate and absolute vested interest in the whole of the property and the disposition imposes no obligation or burden on the other spouse. In the present case the petitioner is not and never has been under liability to pay the premiums on the policy. In *Worsley* v. *Worsley and Wignall* (3) the petitioner was under a continuing liability to pay an annuity to the respondent. See also *Dormer* (*otherwise Ward*) v. *Ward* (4) and *Bosworthwick* v. *Bosworthwick* (5). In *Gulbenkian* v. *Gulbenkian* (6) the respondent had only a contingent interest (if she had any enforceable interest at all). So also in *Stedall* v. *Stedall* (1). In *Smith* v. *Smith* (2) the husband and wife were joint tenants in fee simple of the property; that case may be distinguished because there the respondent was not solely entitled, and the respondent was unable to say—as she can here—that the whole property was hers.

---

(1) Supreme Court of Judicature (Consolidation) Act, 1925, s. 192: "The court may after "pronouncing a decree for divorce "or for nullity of marriage en"quire into the existence of ante"nuptial or post-nuptial settle"ments made on the parties "whose marriage is the subject "of the decree, and may make "such orders with reference to the "application of the whole or any "part of the property settled "either for the benefit of the "children of the marriage or of the "parties to the marriage, as the "court thinks fit, and the court "may exercise the powers con"ferred by this sub-section not"withstanding that there are no "children of the marriage."

(2) [1933] Ch. 126.

(3) (1869) L. R. 1 P. & M. 648.

(4) [1900] P. 130; [1901] P. 20 (C. A.).

(5) [1927] P. 64.

(6) [1927] P. 237.

The respondent relies on *Chalmers* v. *Chalmers* (3), *Hubbard (otherwise Rogers)* v. *Hubbard* (4) and *Brown* v. *Brown* (5). In the latter case Langton J. based his decision on the fact that when the petitioner paid over to the insurance company the consideration money for the annuity which she purchased for the respondent, she parted with the plenum dominium over the property transferred. The same principle is applicable here. Each time that the applicant paid a premium under the policy there was a gift to the respondent, and on the occasion of each payment the applicant parted with the plenum dominium over the money so paid.

Berkeley in reply.

WALLINGTON J. I would like to say that the case has been extremely well argued on both sides with a skill and knowledge and helpfulness that has very much reduced the difficulty that I would otherwise have had in dealing with this case.

His Lordship continued: I do not think it necessary to set out in any detail the various contentions and the various bases on which those contentions rest on both sides. It is enough to say that learned counsel for the husband pressed for the variation of this policy as a settlement within the provisions of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, which, for the purpose of this case at least, is in effect the same as the previous legislative provision dealing with this type of application, namely, s. 5 of the Matrimonial Causes Act, 1859. The authorities presented to me that came into existence before the existing provision are therefore applicable to matters arising under the present section. Jurisdiction under the section depends upon whether the transaction or document relied upon as a settlement is, in fact and in law, a settlement within the meaning of that word in the section.

Mr. Berkeley for the husband has cited a number of authorities, the references to which I will give in a moment, and has made the submission (based upon reasons which he stated

---

(1) (1902) 18 T. L. R. 254.
(2) (1945) 61 T. L. R. 331.
(3) 68 L. T. 28.
(4) [1901] P. 157.
(5) [1937] P. 7.

1948

GUNNER
v.
GUNNER
AND
STIRLING.

Wallington J.

with clarity and fairness) that the form of the transaction is immaterial, but that if the transaction, whatever be its form, is one made under the provisions of the Married Women's Property Act, 1882—as this quite plainly is—and in and by it provision is made for the wife as the husband's spouse and the provision is made for her in her character as his wife, and that if the legal effect of the transaction is subsisting at the material date—which is the date on which the decree is made absolute in this suit—there is a settlement within the meaning of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. He concedes that in this case, as in all similar cases, there is created a trust in favour of the wife, by reason of the provisions of s. 11 of the Married Women's Property Act, 1882, at the moment when the policy is effected, a trust under which the husband is trustee and the wife the cestui que trust, the husband as trustee being subject to all the duties and obligations of a trustee and the wife immediately on the policy being effected becoming entitled to a vested interest in the policy. He further submits that, as a result of what I have indicated, and on the facts of this case, the trust is one which continues and in this case has continued down to and beyond the crucial date ; that none of the policy moneys have been received by anybody—the event upon which they can be received by anybody has not arrived—and therefore the document and the accompanying facts constitute a settlement which is within s. 192.

Mr. Brightman on the other hand has contended that there can be no settlement if there is an out and out gift ; that in this case the legal effect of the policy is to make over to the wife a complete gift of the rights under the policy and that with the payment of each premium by the husband the husband automatically loses any right in the premium that is paid. He added that the wife becomes under the provisions of the policy the donee of the policy and each separate premium with its advantages when it is paid. That is the fundamental basis on which Mr. Brightman rests his case.

I shall indicate the various authorities, but I am not going to discuss them in detail because I do not think it is necessary for me to do so. It is agreed that the cases cited by Mr. Berkeley are the only cases that are of any real assistance upon this point. The circumstances of each of those cases have been closely investigated and learned counsel on both sides have pointed out their distinguishing features. Those features in the decided cases which support the view that this is a case of a settlement within the section under which this jurisdiction arises have been indicated with clarity and complete accuracy. Mr. Brightman has also shown that the cases in which variations have been made in transactions which have been alleged to be and have been held to be settlements variable under this section depend for example upon the existence of a burden or obligation upon the person making the settlement. In this case it is the husband. Mr. Berkeley says that that is not conclusive at all, his submission being that the court must look at the real purpose of the transaction. If the real purpose of this transaction is to be effected, then the husband must go on paying the premiums; unless he does so neither he nor anybody else can ever get the benefit of the policy moneys because they will cease to be payable.

In my view this policy is a policy which was taken out by the husband at a time when he had no reason to suppose that there would be any likelihood of the marriage being dissolved; he effected the policy in order that he might by periodical payments be able at the expiration of the period mentioned in the policy to make a provision to the extent of 5,000*l.* for his wife, because she was his wife, and because for that reason he desired that he should make provision for her. The event on the happening of which the sum is to be paid is the death of the assured, that is, the husband. That would obviously be a time at which, in his view, the wife left as a widow would be in need of the provision. It is not stretching one's imagination too far to say that it may well have been that in 1944, when this marriage was eight and a half years old and he was about thirty-five years of age, the husband would be unable, unless he made some arrangement of this kind, to make such a provision as he felt his wife would be in need of at his death. It cannot be supposed in my view that he would have dreamt of making such provision if she had not been his wife and if he had not felt himself under an obligation to do his best for her because she was his wife. It follows, therefore, if I am right, that this provision was made for her in her character of a wife. If that is the true view of the matter then it is plain that unless the husband went on paying the premiums, although under no contractual obligation to pay them, it would be impossible to achieve the purpose that he must have had in mind when he effected the policy. Again, it must be remembered that if in the circumstances he continues to pay the premiums he will be continuing to make provision for a woman who is no longer his wife and has ceased to be his wife because she has not resisted the temptation to indulge in a matrimonial offence which has brought the marriage to an end.

The authorities which have been referred to and which are relied upon are *Cousins* v. *Sun Life Assurance Co.* (1); *Worsley* v. *Worsley and Wignall* (2); *Dormer* (*otherwise Ward*) v. *Ward* (3); *Bosworthwick* v. *Bosworthwick* (4); *Stedall* v. *Stedall* (5); *Prinsep* v. *Prinsep* (6); *Melvill* v. *Melvill and Woodward* (7); *Smith* v. *Smith* (8); *Gulbenkian* v. *Gulbenkian* (9). It is upon those cases that Mr. Berkeley has relied in support of his argument that this transaction has created a settlement within the meaning of s. 192. There are three other cases that he cited (in order to make the list of authorities complete) upon which he does not rely but upon which Mr. Brightman does; they are *Chalmers* v. *Chalmers* (10); *Hubbard* (*otherwise Rogers*) v. *Hubbard* (11) and *Brown* v. *Brown* (12). I need refer only to one or two of those cases to illustrate the kind of view that has been expressed when this question has come before the court.

In *Cousins* v. *Sun Life Assurance Company*, Lord Hanworth M.R. says (13): "Our attention has been called to "a great number of cases, but the point seems really to "be plain enough, and there is certainly one previous decision "which supports the view come to by this court. It will be "observed that the policy is declared to be for the benefit of a "named wife. Two sections in successive Married Women's "Property Acts have dealt with the case of an insurance policy "taken out by a husband or a wife for the benefit of the other." His Lordship then read s. 10 of the Act of 1870, and having dealt with it at some length said, with regard to the provisions of the Married Women's Property Act, 1882: "I have looked "in vain for any statement introducing a contingency to negative the creation of a vested interest in favour of this named "wife. It is suggested that the section provides in certain "events for the policy moneys reverting to and becoming part "of the estate of the insured person. But when is this to "happen?" His Lordship dealt with that question in full,

(1) [1933] Ch. 126.
(2) L. R. 1 P. & M. 648.
(3) [1901] P. 20.
(4) [1927] P. 64.
(5) 18 T. L. R. 254.
(6) [1929] P. 225.
(7) [1930] P. 159.
(8) 61 T. L. R. 331.
(9) [1927] P. 237.
(10) 68 L. T. 28.
(11) [1901] P. 157.
(12) [1937] P. 7.
(13) [1933] Ch. 126, 132.

and came to the conclusion that is set out in the headnote: "The wife took an immediate vested interest in the policy "which passed on her death in the husband's lifetime to her "personal representatives as part of her estate." It was necessary to reach the decision because the plaintiff, who was the husband and who had taken out the policy, had claimed against the Sun Life Assurance Society and the executors of Lilian Cousins his wife, who had died on October 3, 1931, that he was the sole beneficiary. That case establishes quite plainly that in a case such as the one before me the wife does acquire an immediate vested interest. About that there is no question. But the further question arises whether obtaining an immediate vested interest is an event which withdraws the transaction—I use that neutral expression—from the provision of s. 192.

In *Bosworthwick* v. *Bosworthwick* (1) the question was whether a bond executed by a wife securing to her husband an immediate annuity of 300*l.* for his life was a settlement within the meaning of this section. The headnote indicates that the court came to the conclusion that "a liberal interpretation "according to their obvious purpose must be given to s. 5 of "the Matrimonial Causes Act, 1859, and s. 192 of the Supreme "Court of Judicature (Consolidation) Act, 1925, and that, "although the bond did not involve the settlement of property, "or a charge on property, for successive interests, it neverthe-"less amounted to a post-nuptial settlement within the meaning "of those sections, and that the court had power, consequent "upon the dissolution of the marriage, to deal with the bond "and discharge it."

That case is enlightening on two matters, one that a transaction may be a settlement within the meaning of s. 192, although it falls far short of being a settlement such as Chancery judges and practitioners in the Chancery Courts would require before they could hold that there was a settlement. It follows therefore, that I need not find anything like a strict settlement in order to invoke the jurisdiction of this section. A second point that emerges from this case is that having dealt fully with a number of cases, including that of *Dormer* (*otherwise Ward*) v. *Ward* (2), Lord Hanworth indicates (3): "Gorell "Barnes J." (who dealt with *Dormer* (*otherwise Ward*) v. *Ward* in the court below (2)) "appears to have taken the

---

(1) [1927] P. 64.

(2) [1900] P. 130; [1901] P. 20 (C. A.).

(3) [1927] P. 64, 70.

"view that the covenant merely created a debt, and that he "ought not to make an order dealing with it. But on appeal, "in spite of the argument urged in support of the decision in "the court below, the Court of Appeal held that it had jurisdiction to deal with the covenant apart from the settlement, "and if we were to hold that there was no jurisdiction in the "present case, I think we should be running counter to the "decision of this court in *Dormer* (*otherwise Ward*) v. *Ward* (1) "which we cannot do. On consideration of the authorities, "the ground of my decision is that the section is to be construed "liberally and widely, and I do not intend to narrow the meaning of the word 'settlement'." Romer J., who was then sitting in the Court of Appeal, delivered a short judgment in the course of which he said this (2): "We have had numerous "authorities cited to us going as far back as 1861, and amongst "them an authority which is binding on this court, and in my "judgment those authorities establish that where a husband "has made provision for his wife, or a wife for her husband, in "the nature of periodical payments, that amounts to a "settlement within the meaning of the sections. That may "appear to be a very liberal construction of the sections, but "I think that it is no more liberal a construction than should "be given to them, having regard to the obvious purposes for "which they were enacted by the legislature."

In *Prinsep* v. *Prinsep*, Hill J. says (3): "The main point "in issue is whether the settlement of August 25, 1920, is a "'post-nuptial settlement on the parties' within the meaning "of s. 192 of the Judicature Act, 1925." The document he was there referring to was a deed whereby the mother of the husband brought into a settlement trust funds amounting to a large sum of money; and (4) "by a deed of separation entered "into by the husband and the wife on February 23, 1926, the "wife was to receive an allowance from the husband of 2,000*l.* "a year for life, of which any moneys received by her under the "marriage settlement, the deed of covenant, or settlement of "1920 should be treated as part payment and satisfaction." The court treated the matter of the allowances by the husband under the separation deed as a settlement within the meaning of this section. The learned judge continued (5): "Is it upon "the husband in the character of husband or on the wife in

---

(1) [1900] P. 130; [1901] P. 20 (C. A.).

(2) [1927] P. 64, 72.

(3) [1929] P. 225, 232.

(4) Ibid. 227.

(5) Ibid. 232.

"the character of wife, or upon both in the character of "husband and wife? If it is, it is a settlement on the parties "within the meaning of the section. The particular form of it "does not matter. It may be a settlement in the strictest "sense of the term, it may be a covenant to pay by one spouse "to the other, or by a third person to a spouse. What does "matter is that it should provide for the financial benefit of "one or other or both of the spouses as spouses and with "reference to their married state. Is the settlement of "August 25, 1940, of that character? It was made at a time "when there was a husband, Mr. Prinsep, and there was a wife, "Mrs. Prinsep, and there was also a child of the marriage. "In terms, it has in contemplation Mr. Prinsep, whom it "designates 'principal beneficiary,' but it also has in contemplation his then wife, Mrs. Prinsep, and any future wife "and his child and any future children. The trustees are, "however, given a very wide discretion. Clause 3 deals with "income. During the lifetime of Mr. Prinsep it is to be applied "for the benefit of all or any one of the following, Mr. Prinsep, "his issue by any marriage and any wife of his, as the trustees "in their absolute discretion think fit; and if no wife or issue "is living then they have the like discretion as between "Mr. Prinsep and the persons who would be entitled if he were "dead." Hill J. goes on in a great deal more detail with regard to the precise question, but those are the passages that I desire to refer to as indicating the basis upon which the learned judge deals with the consideration of the question whether the deeds and documents with which he was dealing constituted a settlement or not.

The case of *Melvill* v. *Melvill and Woodward* (1) is important on the same question, Lord Hanworth says (2): "The "interpretation which is to be given to the section has been "laid down in a number of cases as a wide interpretation. "In *Worsley* v. *Worsley* (3) Lord Penzance says: 'The court "'would have a great difficulty in saying that any deed which "'is a settlement of property, made after marriage, and on the "'parties to the marriage, is not a post-nuptial settlement. "'It would not be justified in narrowing the reasonable scope "'of the words used in the section. The substance of the "'matter is, that the legislature by this section has armed the

---

(1) [1930] P. 159.
(2) Ibid. 171.
(3) L. R. 1 P. & M. 648, 651.

" 'court with authority to make special arrangements in the " 'case of a woman being found guilty of adultery, in reference " 'to property settled upon her in her character as a wife.' " The same interpretation of the section was adopted by " Gorell Barnes J., as he then was, in *Blood* v. *Blood* (1) where " he says : 'Those words are extremely wide, and I am anxious " 'that they should not, by any construction the court may " 'put upon them, be narrowed in any way'." The learned Master of the Rolls goes on : " In *Churchward* v. *Churchward* (2) " the President, Sir Samuel Evans, says : 'I adopt in the fullest " 'sense, both in the letter and the spirit, the words of Gorell " 'Barnes J. in *Blood* v. *Blood* (1).' He then quotes the " passage to which I have just referred, and adds : 'To " 'narrow them would be undesirable for this reason : the " 'various circumstances which come before the court, and for " 'which this section is brought into operation, are so diverse " 'that it is to my mind extremely important that, so far as " 'possible, the court should have power to deal with all the " 'cases that come before it, and, in dealing with them, to meet " 'the justice of the case'." On p. 173 Lord Hanworth says : " I think the court ought always to bear in mind the " words which have been used by Gorell Barnes J. and approved " by the President, Sir Samuel Evans, that the section is " intended to be a wide one and embraces a large number of " settlements which might not appear to be settlements in the " strict terms of a conveyancer, because the section is intended " to operate in a number of cases not easy to catalogue under " any definition. But we have it stated in *Bosworthwick* v. " *Bosworthwick* (3) that there may be a settlement, although " it does not involve the settlement of property, or a charge of " property for successive interest. In that case there was an " annuity secured by a bond, and it was held to be a settlement " within the terms of the section."

In *Smith* v. *Smith* (4) there was a house owned jointly by a husband and wife as joint tenants. I need not refer here to the details of that case, in which Denning J. came to the conclusion, and—if I may say so with respect, in my opinion, the right conclusion—that there was a transaction in circumstances which brought it within the provisions of this section because there was in fact a settlement of the property, for the reasons which are set out in the judgment.

(1) [1902] P. 78, 82.
(2) [1910] P. 195, 197.
(3) [1927] P. 64.
(4) 61 T. L. R. 331.

Those are, I think, the essential features of the authorities to which I have referred and I ought now to mention the three other authorities that were relied upon by counsel for the respondent as showing that the case before me falls within those cases and is not affected by those on which counsel for the petitioner particularly relies.

In *Chalmers* v. *Chalmers* (1), the first of these cases, there was an absolute assignment of property subject to mortgage or mortgages. Sir Francis Jeune P., in his judgment, used this phrase (2): "A settlement means the settlement of property "subsisting between husband and wife and the Act gives power "to alter or vary when and only when the relation of husband "and wife have ceased to subsist. The power to dispose of "it absolutely does not seem to be the test." That was a case in which the court had to hold that it could not be said that there was a settlement variable under the section for the reason that there was a complete and completed assignment by the wife to the husband, and, therefore, the property having entirely passed the transaction could not be regarded as a settlement of property within this section. In *Hubbard* (*otherwise Rogers*) v. *Hubbard* (3) the husband had assigned to a trustee a leasehold house and some furniture on trust absolutely, and the trustees assigned the same accordingly. The wife having obtained a decree of nullity the Court of Appeal held that the assignment was not a settlement within the provisions of this section. *Brown* v. *Brown* (4) was a case in which a wife had purchased an annuity and the society granting the annuity had covenanted to pay the annuity to the husband or his assigns. The wife had parted with her money and there was no possibility of anything coming back to her under the terms of the transaction and the court held that that could not be a settlement within the meaning of this section.

Earlier I set out the facts in regard to the settlement before me in terms which I hope are clear. In my opinion the transaction here was, for the reasons that I have stated, a settlement within the meaning of this section and one therefore that the court has jurisdiction to vary. I want to make it clear that I do not intend to decide, and I hope nobody will ever suppose that I am deciding, that in every case in which a policy is taken out by husband or wife in favour of the other under the provisions of or regulated by the terms of s. 11 of the Married

(1) 68 L. T. 28.
(2) Ibid. 29.
(3) [1901] P. 157.
(4) [1937] P. 7.

1948

GUNNER
v.
GUNNER
AND
STIRLING.

Wallington J.

Women's Property Act, 1882, there is a settlement that can be varied. I do not decide that because it is not before me and also for the reason that there may be many variations in the terms of the policy, although it is issued taking advantage of the express trust to which the policy becomes subject when it is issued in pursuance of the provisions of that section. There may be also an infinite variety of circumstances in and about the issue of the policy. There may be other accompanying documents or there may be evidence of oral declarations and of suggestions made and accepted and of facts which show that whatever the terms of the policy may be when looked at and construed strictly, the intention of the parties or of the husband or wife, as the case may be, is to create what is and will be in effect a settlement variable under this section. I am not supposing that any of them will be likely to have the terms of either section or the legal effect of their transaction in their mind; but there may be evidence which would alter the character of the transaction in such a way as to make it differ fundamentally from the transaction in the present case. I want to make it plain therefore that I am dealing with this case and with no other case, and that my decision rests upon the facts and documents in this case only.

I think that disposes of the main point before me which is the question submitted by the learned registrar: i.e., whether the policy can be regarded as a settlement at all for the purposes of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. I think it can and I have so held.

[Having considered the details and merits of the case before him his Lordship then varied the terms of the policy. The insurance company had already agreed to submit to the decision of the court.]

Solicitors: *Kenneth Brown, Baker, Baker; Evill & Coleman.*

J. B. G.

BOWN *v.* BOWN AND WESTON.

1948
May 14.

Wallington J.

Divorce—Variation of settlement—Husband petitioner's life policy—Beneficiary the wife of the assured during her life-time—Whether a settlement and therefore variable—Supreme Court of Judicature (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 192.

In consideration of a single premium paid by a husband a life assurance company issued a policy whereby they undertook to pay a certain sum on his death. The wife of the assured was specified as the beneficiary during her lifetime. The marriage was subsequently dissolved because of the wife's adultery, and the husband sought to vary the provisions of the policy.

Held that the policy, which was issued for the benefit of the wife in her character of a wife was a post-nuptial settlement within the meaning of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Gunner v. *Gunner and Stirling* ante p. 77 followed and applied.

APPLICATION by a husband petitioner for variation of a post-nuptial settlement.

The parties were married in 1913, and there were five children of the marriage. In 1921, the applicant took out a policy of insurance, dated June 21, 1920, with the Canada Life Assurance Company, whereby that company undertook, in consideration of a single premium of 1,020*l*., to pay the sum of 2,082*l*. with profits on the death of the assured : with all accrued benefits, the policy was worth some 2,960*l*. by the end of 1947. The beneficiary was described as " the wife of the assured, beneficiary " during her lifetime." By cl. 9 of the privileges of the policy : " If any beneficiary die before the assured the interests of such " beneficiary shall vest in the assured. In the event of this " policy becoming a claim before the appointment of any " beneficiary the sum assured hereunder shall be payable to the " assured's executors, administrators and assigns." In February, 1931, the husband obtained a decree nisi of divorce on the ground of his wife's adultery ; this decree was made absolute in August, 1931. He married again in 1932, and his second wife died in the following year, leaving an infant son who survived ; and in 1942 he married for the third time. When the application was made he was a sick man in receipt of a pension which was due to cease on his death : he was educating the son of his second marriage and he had little to leave to that son or to his wife. Leave to file his application out of time was granted, and in his report Mr. Registrar Long submitted that

BOSTOCK. [1950] 1 All E.R. 25.

pplied. MOLE *v.* MOLE. [1950] 2
ll E.R. 328.

Explained. MOLE *v.* MOLE [1951] P. 21

Distinguished. BOSTOCK *v.* BOSTOCK. [1950] P. 154

McTAGGART *v.* McTAGGART.

C. A.

1948
Oct. 15.

Bucknill,
Cohen and
Denning L.JJ.

pplied. POOL *v.* POOL [1951] P. 470

Divorce—Evidence at hearing of petition—Statements made by husband or wife at interview with probation officer—Privilege.

Per COHEN and DENNING L.JJ. Where, at the hearing of a petition for divorce, evidence, relevant to the issue, is tendered as to what was said at an interview between the spouses arranged, with a view to their reconciliation, by a probation officer, at which he himself was present, then if either the husband or the wife objects (on the ground that it is privileged from disclosure), to such evidence being given either by the other spouse or the probation officer, the objection is valid in law, since the discussion at the interview, between the three of them, must be considered as made "without prejudice," even though nothing is said to that effect. The estrangement having reached a stage where the spouses consult a probation officer, it is clear that the dispute, if there is no reconciliation, may reach either a court of summary jurisdiction or the Divorce Court and that accordingly litigation is imminent. The probation officer himself can make no claim to such privilege.

APPEAL from an order of Mr. Commissioner Grazebrook K.C., granting a decree nisi for divorce to a husband who petitioned on the ground that his wife had deserted him without cause for a period of at least three years immediately preceding the presentation of the petition, to wit from and since March, 1943. The date of the petition was July 10, 1947. The wife by her answer, denied the desertion and alleged that her husband had deserted her, without cause, for a period of at least three years before the presentation of the petition, but she did not ask for the dissolution of the marriage. Both the petition and the answer referred to an interview at Hampstead, between a probation officer, the husband and the wife, the husband by his petition stating that, at that interview, his wife had declined to live with him.

At the hearing of the petition, the petitioner who had been directed to work as a chef at a canteen in Barrow-in-Furness said that he came to London in February, 1943 and went to the matrimonial home in Gayton Crescent, where his wife was living. The door was opened by a strange woman. He saw no signs of his wife there and, being ill, he went to his mother's home at Earls Court where he went to bed and stayed there for some weeks. Evidence was given that the wife, having been informed by her husband's employers, that her husband was in

C. A.

1948

McTaggart
v.
McTaggart.

London, went to see a probation officer at Hampstead, who wrote to the husband suggesting that he should interview the husband and wife and this interview took place on March 20, 1943. Husband and wife gave conflicting evidence as to what then occurred : the husband said that his wife refused to take him back and flounced out of the room, whereas he had said that he was willing to have her back. The wife said that nothing of the sort had happened and that she had never said that she was not prepared to take him back.

The probation officer who, acting in accordance with a Home, Office memorandum had declined to give a proof to either side and had refused to attend the Divorce Court, except on subpœna, was subpœnaed by both the husband and the wife. The commissioner after expressing some doubt as to whether the probation officer should give evidence in the case, decided that he could not do justice without hearing him. Accordingly, the probation officer was called. He was asked : " Did you " ask Mr. McTaggart whether he was willing to go back ? . . . . " (A.) I did ask him whether he was prepared to return home. " (Q.) What did he say ? (A.) He said that he was prepared " to do so. (Q.) Did you ask Mrs. McTaggart ? (A.) Yes, " I did. (Q.) What did she say ? (A.) She said that at that " time she was not prepared to have him back." The probation officer had suggested that both parties should have time to think it over and proposed that the matter should be left in abeyance for a week. The wife kept the appointment, but the husband did not, writing to the probation officer that he had at that hour to see someone about a situation at the Labour Exchange. " I give you my assurance," he wrote, " that I " will do my very best as regards to my wife's and daughter's " maintenance directly I do start work again and will post you " particulars of the same . . . . Thanking you for your " effort on behalf of my wife and self . . . ." On the facts, which are not fully here related, the commissioner said that he believed the husband rather than the wife, supported, as he was, by another witness whose evidence he accepted and in view of the evidence of the probation officer, which he thought supported the husband rather than the wife, he came to the conclusion that the petitioner had made out his case and he pronounced a decree nisi. The wife appealed.

Reuben for the wife.
Elliot Gorst for the husband.

Bostock. [1950] 1 All E.R. 25.

pplied. Mole *v.* Mole. [1950] 2 ll E.R. 328.

Explained. Mole *v.* Mole [1951] P. 21

Distinguished. Bostock *v.* Bostock. [1950] P. 154

C. A

1948 *Oct.* 15.

Bucknill, Cohen and Denning L.JJ.

pplied. Pool *v.* Pool [1951] P. 470

McTAGGART *v.* McTAGGART.

Divorce—Evidence at hearing of petition—Statements made by husband or wife at interview with probation officer—Privilege.

Per Cohen and Denning L.JJ. Where, at the hearing of a petition for divorce, evidence, relevant to the issue, is tendered as to what was said at an interview between the spouses arranged, with a view to their reconciliation, by a probation officer, at which he himself was present, then if either the husband or the wife objects (on the ground that it is privileged from disclosure), to such evidence being given either by the other spouse or the probation officer, the objection is valid in law, since the discussion at the interview, between the three of them, must be considered as made "without prejudice," even though nothing is said to that effect. The estrangement having reached a stage where the spouses consult a probation officer, it is clear that the dispute, if there is no reconciliation, may reach either a court of summary jurisdiction or the Divorce Court and that accordingly litigation is imminent. The probation officer himself can make no claim to such privilege.

Appeal from an order of Mr. Commissioner Grazebrook K.C., granting a decree nisi for divorce to a husband who petitioned on the ground that his wife had deserted him without cause for a period of at least three years immediately preceding the presentation of the petition, to wit from and since March, 1943. The date of the petition was July 10, 1947. The wife by her answer, denied the desertion and alleged that her husband had deserted her, without cause, for a period of at least three years before the presentation of the petition, but she did not ask for the dissolution of the marriage. Both the petition and the answer referred to an interview at Hampstead, between a probation officer, the husband and the wife, the husband by his petition stating that, at that interview, his wife had declined to live with him.

At the hearing of the petition, the petitioner who had been directed to work as a chef at a canteen in Barrow-in-Furness said that he came to London in February, 1943 and went to the matrimonial home in Gayton Crescent, where his wife was living. The door was opened by a strange woman. He saw no signs of his wife there and, being ill, he went to his mother's home at Earls Court where he went to bed and stayed there for some weeks. Evidence was given that the wife, having been informed by her husband's employers, that her husband was in

C. A.

1948

McTaggart
v.
McTaggart.

London, went to see a probation officer at Hampstead, who wrote to the husband suggesting that he should interview the husband and wife and this interview took place on March 20, 1943. Husband and wife gave conflicting evidence as to what then occurred: the husband said that his wife refused to take him back and flounced out of the room, whereas he had said that he was willing to have her back. The wife said that nothing of the sort had happened and that she had never said that she was not prepared to take him back.

The probation officer who, acting in accordance with a Home Office memorandum had declined to give a proof to either side and had refused to attend the Divorce Court, except on subpœna, was subpœnaed by both the husband and the wife. The commissioner after expressing some doubt as to whether the probation officer should give evidence in the case, decided that he could not do justice without hearing him. Accordingly, the probation officer was called. He was asked: "Did you "ask Mr. McTaggart whether he was willing to go back? . . . . "(A.) I did ask him whether he was prepared to return home. "(Q.) What did he say? (A.) He said that he was prepared "to do so. (Q.) Did you ask Mrs. McTaggart? (A.) Yes, "I did. (Q.) What did she say? (A.) She said that at that "time she was not prepared to have him back." The probation officer had suggested that both parties should have time to think it over and proposed that the matter should be left in abeyance for a week. The wife kept the appointment, but the husband did not, writing to the probation officer that he had at that hour to see someone about a situation at the Labour Exchange. "I give you my assurance," he wrote, "that I "will do my very best as regards to my wife's and daughter's "maintenance directly I do start work again and will post you "particulars of the same . . . . Thanking you for your "effort on behalf of my wife and self . . . ." On the facts, which are not fully here related, the commissioner said that he believed the husband rather than the wife, supported, as he was, by another witness whose evidence he accepted and in view of the evidence of the probation officer, which he thought supported the husband rather than the wife, he came to the conclusion that the petitioner had made out his case and he pronounced a decree nisi. The wife appealed.

Reuben for the wife.
Elliot Gorst for the husband.

Bucknill L.J. in the course of delivering judgment said that according to the husband, whom the commissioner had believed, he had made a number of efforts to persuade his wife to take him back and on each occasion she had refused. That went on certainly until 1944. There was an important interview at the end of 1943 when the husband handed to his daughter papers in connexion with bomb damage to enable her to draw about 180*l*. He (the learned Lord Justice) came to the conclusion that the wife never changed her view expressed before the probation officer, although it was perhaps a temporary view, and she had adhered to that threat. The appeal must be dismissed.

Cohen L.J. I agree and I only want to add a few observations on one point. The case turned largely on what transpired at an interview between the parties in March, 1943, arranged by the probation officer. The wife and the husband gave conflicting evidence on what had then been said. The judge accepted the husband's evidence, mainly because he thought that it was corroborated by the probation officer who was, very properly, a reluctant witness. He refused to give a statement to either party and would appear only on subpœna. The commissioner at first was reluctant to admit his evidence, but in the end decided that he must do so in view of the conflict of evidence between husband and wife.

In my opinion, the judge had no alternative. The privilege, if any, was the privilege of the parties and they, having given evidence on what was said at the interview, could not assert the privilege. The result is, none the less, unfortunate as the success of attempts at reconciliation might be prejudiced, if it became known that the probation officer could be called subsequently to give evidence, and I desire to make it clear that, as at present advised, I think that, if objection had been taken by the wife to the husband giving evidence as to this issue the objection would have been valid. Such a conclusion seems to me to be within the principle that discussions and correspondence in negotiations if "without prejudice," are privileged, unless the parties waive the privilege. I would refer in this connexion to some observations of Lush J. in *La Roche* v. *Armstrong* (1): "There is no authority upon the "point"—that was the question as to whether certain matters should be admitted in evidence—"but my reason is that to

---

(1) [1922] 1 K. B. 485.

"rule otherwise would in many cases make negotiations for the "settlement of litigation almost impossible. Unless parties "to such negotiations can feel safe in making an offer and "stating the facts on which it is based, the door to negotiations "may be closed. It is for the benefit of litigants and others "that statements should be freely made in order to settle "litigation." In that case the correspondence concerned was that of solicitors and the litigation was actually pending, but it seems to me that the principle applies to negotiations to avoid threatened litigation and a fortiori to negotiations between parties themselves. No one will be prejudiced by such a rule as I have suggested, for, if reconciliation takes place, there is an end of the matter, and, if the attempts at reconciliation fail, the aggrieved party can always ask the alleged deserting party to return. I agree that the appeal should be dismissed.

Denning L.J. I agree and desire particularly to associate myself with the observations which Cohen L.J. has just made. It seems to me that negotiations which take place in the presence of the probation officer, with a view to reconciliation are on the understanding, in the ordinary way, by all concerned, that they are to be without prejudice to the rights of the parties. The rule as to "without prejudice" communications applies with especial force to negotiations for reconciliation. It applies whenever the dispute has got to such dimensions that litigation is imminent. In all cases where the estrangement has reached the stage where the parties consult a probation officer that is the case. Then, it is clear that there is a dispute which may end either in the magistrates' court or the Divorce Court. The probation officer has no privilege of his own in respect of disclosure any more than a priest, or a medical man, or a banker, and on that account, it has been sometimes supposed that the court will compel a probation officer to give evidence of what took place in the course of a negotiation. That is a mistake. The law favours reconciliation and the court will not normally take upon itself a course which would be so prejudicial to its success. If a probation officer should be compelled to give evidence as to what was said in the course of negotiations, it would mean that he would not be told the truth, or, at all events, not the whole truth. The parties would have, at the back of their minds, the thought that whatever they said might be given in evidence against them or for them and would colour their statement accordingly. There is no chance of reconciliation, unless the

C. A.
1948
McTaggart
v.
McTaggart.
Denning L.J.

parties are able to talk with frankness to the probation officer and with complete confidence that what they say will not be disclosed. If they are genuinely seeking his assistance, they must be taken to negotiate on that understanding, even though nothing is expressly said. In this case, however, neither party claimed the privilege and must, therefore, be taken to have waived it. Speaking for myself, that is the only ground on which I thought it right to look at the evidence of the probation officer in this case. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the wife: *A. B. Carpenter.*
Solicitor for the husband: *E. Vaughan Williams.*

C. G. M.

C. A.
1948
Oct. 18, 19.
Bucknill and Denning L.JJ. and Pilcher J.

DUNN v. DUNN.

Divorce — Desertion — Sailor husband returns after four years' absence—Requests wife to reside, for unknown period, with him, at a port—Refusal by deaf wife with two children to leave present home—Reasonableness of refusal—Legal burden of proof throughout on husband to prove desertion without cause—Wife may seek to rebut inference from refusal, by proving just cause—No legal burden of proof on wife—Matrimonial home—Whose choice?

A seaman petitioned for divorce on the ground of desertion without cause, alleging that when he had returned from long service overseas he had requested his wife to leave her present inland matrimonial home and stay with him for an unspecified period at a port, where he was stationed, and where he had taken accommodation for his wife and family; and that she had refused and persisted in her refusal of his request. The argument was put forward for the husband that he had the right to decide where the spouses should live (*Mansey* v. *Mansey* [1940] P. 139); that if the wife refused to join him she was guilty of desertion, unless she could prove that she had a just cause for her refusal; and that the burden of proof was on her to prove just cause.

Per Denning L.J. This argument is fallacious from a failure to distinguish between a burden of proof that is legal—laid down by law—and a burden raised by the state of the evidence. See *Emanuel* v. *Emanuel* [1946] P. 115, at p. 118. The legal burden in this case rested throughout on the husband to prove that his wife deserted him without cause. To discharge that burden he relied on the fact that he had asked her to join him where he was stationed and she had refused. That was a fact from which the court might have inferred that she had deserted him without cause, but it was not bound to do so. Once he proved the fact of refusal, she might seek to rebut the inference of desertion by proving that she had just cause for her refusal (and indeed that was usually the wise course), but there was no legal burden of proof on her to do so. Even if she did not affirmatively prove just cause, the court had still at the end of the case to ask itself: Has the legal burden been discharged? Has the husband proved that she deserted him without cause?

It is not a proposition of law that a husband has the right to say where shall be the matrimonial home. If that were so, it would put a legal burden on the wife to justify her refusal in this case; but it is not a proposition of law and Henn Collins J. in *Mansey* v. *Mansey* (supra) could not have intended it to be so. It is simply a proposition of ordinary good sense, arising from the fact that the husband is usually the wage earner and has to live near his work. It is not a proposition which applies to all cases. The decision where the home should be is a decision which affects both the spouses and their children. It is their duty to decide it by agreement—by give and take—and not by the imposition of the will of one over that of the other. Each spouse is entitled to an equal voice in the ordering of the affairs which are their common concern. Neither has a casting vote, though to be sure they should try so to arrange their affairs that they spend their time together and not apart. If such an arrangement is frustrated by the unreasonableness of one or the other and this leads to a separation between them, then the party who has produced the separation by reason of his or her unreasonable behaviour is guilty of desertion.

PILCHER J. agreed with what had been said by DENNING L.J. as to the legal onus of proof, but he was of opinion that in a case of difference of opinion as to the place of the matrimonial home someone must have a casting vote.

APPEAL from a decision of Jones J.

Albert Edward Dunn married his wife Euphemia in 1926, when he was nineteen and his wife twenty-seven years of age. She suffered to a severe degree from deafness by reason of which her husband said that she was unable to write and he, after the marriage, taught her to write. Their home was in a village near Morpeth, Northumberland. The husband was a sailor in the Royal Navy and in 1934 she went to Portsmouth and with their son then aged seven stayed with her husband for about ten weeks. The wife was very unhappy at Portsmouth because of her deafness and wanted to get back home. She had lived in the neighbourhood of Morpeth all her life and she had only left that vicinity on this one occasion before 1941.

In 1936, her husband agreed to buy a house through the agency of a building society at Morpeth, and did so. In 1937 the husband signed on in the navy for another ten years and sailed for the China station and, owing to the war, he did not return to England until May, 1941, when he was stationed at Gosport. His rating then being that of chief petty officer (stoker), he went on leave to see his wife at Morpeth and he was there for a number of weeks. Whilst in Morpeth there was a quarrel about a sum of 80*l.* which the wife had been able to save out of his allotment. The husband demanded one half of this sum; the wife refused to hand it over to him, on the ground that she had saved the money for the benefit of the family and the children. This quarrel continued and serious trouble arose from it. The two children of the family were aged fourteen and seventeen and the elder, a lad, had just gone out to work. The husband endeavoured to get his wife to come down to him at Gosport but she did not go. In August, 1941, the husband was ordered to Immingham, Lincolnshire, and he remained there until February, 1942, when he was sent to Barrow-in-Furness. At Immingham the husband was able to get accommodation in a house, consisting of two bedrooms and a kitchen and he asked his wife to go there and live with him; but she did not go. From Immingham, the husband went to stay with his wife in August and again in October, 1941, and he took with him a fur coat which he gave her. Quarrels about the money continued and there was an occasion when he slapped her face and the wife admitted that on one occasion she had said that she did not want to see him again. The last time the spouses had intercourse was in December, 1941, at Morpeth, and that was the last occasion on which they were together. The husband wrote letters of a conciliatory kind from Barrow-in-Furness asking his wife to come there and stay with him but she did not and he never went back to see her at Morpeth. In February, 1942, the husband returned to Portsmouth and the spouses consulted solicitors. Later, from April, 1942, the husband wrote to his wife, using violent and abusive language. The husband had stopped his marriage allowance but that started again in 1942. In April, 1944, the husband commenced to commit adultery with the woman mentioned in his discretion statement, and in May, 1944, he sold his house at Morpeth in which his wife was residing.

The husband brought his petition on April 2, 1947, alleging that his wife had deserted him without cause, for more than three years immediately preceding the date of the petition. The wife, by her answer, denied the desertion. The petitioner's case was that his wife had deserted him from December, 1941. The wife, when in the box, had the assistance of her sister (whose pitch of voice she could hear more easily than that of others) as an interpreter. She appeared to find difficulty in explaining her reasons for not joining her husband at Immingham.

Jones J. accepted the wife's evidence that she had got on well with her husband until 1941, and he disbelieved the husband when he said that in May, 1941, after he had come back from his long service overseas, his wife did not receive him warmly and nagged at him. He gave six reasons why, in his view, the wife had a reasonable excuse for not going to Immingham to stay with her husband: (1.) her severe deafness; (2.) the expense of having two homes; (3.) the difficulty about their boy who had just started work at Morpeth; (4.) the great difficulty of sharing premises with another tenant or landlord because of her deafness; (5.) the violent letters which the husband wrote to the wife; and (6.) the small size of the accommodation at Immingham. He also said: "If, however, she had been "asked by the petitioner in a kindly and conciliatory way to "come to him either at Immingham or Barrow to such premises "as he described, I think that she ought to have gone, as he "had been separated from her for a long time by his service "on the China station and by subsequent service during the "war." He also said that the intervention of this dispute about the savings prevented the husband from making this request to her in the kind and conciliatory tone in which it should have been expressed. "His letters in which he suggests that she "should join him are full of dictatorial threatenings and abusive "expressions." It appeared, however, that the earliest letter, produced at the trial, in which threatening and rude language was used was in April, 1942. Jones J., dismissed the husband's petition and the husband appealed.

G. R. F. Morris for the husband.
Desmond Ackner for the wife.

For the husband it was contended, inter alia, that the husband had the right to decide where the spouses should live; that if his wife refused to live at that place she was guilty of desertion, unless she could prove that she had just cause for her refusal; and that the burden was on her to prove just cause.

On the facts, Bucknill L.J. said that the trial judge was entitled to infer from his opinion of the husband and from the fact that the quarrel about the money had started in May, 1941, as soon as the husband had returned from the China station and from the kind of letters which the husband did write later on from April, 1942, that he had not made his request in a kindly and conciliatory way when he first went to Immingham in August, 1941. He could not say that the conclusion of the trial judge was wrong.

Denning L.J. said that the decisive matter to his mind was that, throughout, the matrimonial home was at Morpeth and the wife was ready and willing to receive her husband there on his leaves whenever he could get there, and that was where the family were. Neither spouse was considerate; but neither was unreasonable. The wife's refusal to go for a short stay elsewhere, it seemed to him in the circumstances of the case, was not unreasonable. Unless he could say that the finding of the trial judge was unreasonable he did not think the Court of Appeal should interfere. That he could not say.

Pilcher J. dissented. He said that he could find no evidence at all that the husband's undoubted efforts to persuade his wife to come down to him at Immingham between August and September, 1941, at any rate were couched in other than kindly and conciliatory terms. He could find no evidence that the quarrel about the money was at the root of the trouble and influenced the wife in any way whatsoever as to her refusal to go to Immingham. In his own view, he could not see what else this chief petty officer could have done. He considered that the husband had established that his wife was at any time since December, 1941, when they last lived together as husband and wife, in desertion. He would have been prepared to exercise the discretion of the court in his favour and to have granted him the relief which he sought.

On the law, Denning L.J. said in the course of delivering the second judgment: In his able argument Mr. Morris put forward this proposition: The husband has the right to decide where the parties shall live; if the wife refuses to join him she is guilty of desertion unless she can prove that she had a just cause for her refusal. The burden, he said, was on her to prove just cause. This argument contains a fallacy which has been put forward from time to time in many branches of the law. The fallacy lies in a failure to distinguish between a legal burden of proof laid down by law and a provisional burden of proof raised by the state of the evidence. I have endeavoured to explain the distinction in an article I wrote in the Law Quarterly Review, vol. 61, at p. 379, and in *Emanuel* v. *Emanuel* (1).

In this case the legal burden throughout was on the petitioner to prove that his wife deserted him, without cause. In order to discharge that burden the petitioner relied on the fact that he asked her to join him and she refused. That is a fact from which the court might have inferred that she had deserted him without cause, but it was not bound to do so. Once he proved the fact of refusal she might seek to rebut the inference of desertion by proving that she had just cause for her refusal; and, indeed, it is usually wise for her to do so. But there was no legal burden on her to that effect. Even if she did not affirmatively prove just cause the court had still, at the end of the case, to ask itself: has the legal burden been discharged? Has the husband proved that she deserted him without cause? Take the facts here. The wife was very deaf, and for that reason could not explain to the court her reasons for refusal. The judge thereupon considered reasons for her refusal which appeared from the facts in evidence, though she had not herself stated that they operated on her mind. Mr. Morris says that the judge ought not to have done that. If there was a legal burden on the wife he would be right, but there was none. The legal burden was on the husband to prove desertion without cause, and the judge was right to ask himself at the end of the case: has that burden been discharged?

I want to say a word also on the proposition that a husband has the right to say where the home should be, for, indeed, it is the same fallacy in another form. If the proposition were a proposition of law it would put a legal burden on the wife to justify her refusal; but it is not a proposition of law and I am sure Henn Collins J. in *Mansey* v. *Mansey* (2) did not intend it as such. It is simply a proposition of ordinary good sense arising from the fact that the husband is usually the wage earner and has to live near his work. It is not a proposition which applies to all cases. The decision where the home should be is a decision which affects both the parties and their children. It is their duty to decide it by agreement, by give and take, and not by the imposition of the will of one over that of the other. Each is entitled to an equal voice in the ordering of the affairs which are their common concern. Neither has a casting vote, though to be sure they should try

---

(1) [1946] P. 115, at p. 118.

(2) [1940] P. 139.

C. A.
1948
DUNN
v.
DUNN.
Denning L.J.

so to arrange their affairs that they spend their time together as a family and not apart. If such an arrangement is frustrated by the unreasonableness of one or the other and this leads to a separation between them, then the party who has produced the separation by reason of his or her unreasonable behaviour is guilty of desertion. The situations which may arise are so various that I think it unwise to attempt any more precise test than that of unreasonableness. Views as to unreasonableness may vary, and the decision is essentially one for the trial judge with which this court should not interfere, unless the conclusion is one which could not reasonably be drawn. If a wife refuses to join her husband at a place where he is ready to receive her, that is, of course, a factor of great weight, but it is not necessarily decisive. In this case the judge has held that the wife's refusal was not unreasonable. She was living with the two children, aged fourteen and seventeen, in the matrimonial home at Morpeth. She had never been away from Morpeth except for a few days in 1934. The husband wanted to uproot them for a stay in war-time at Immingham or Barrow. The stay was to be of uncertain duration and it might be for a few weeks or a few months. It was to be in rooms. The wife was deaf and had difficulty in making herself understood by strangers. A considerate husband would have recognized her difficulty and not have insisted on her coming. A considerate wife would have put up with the difficulties and gone. Neither was considerate. Neither was unreasonable. From his point of view he was not acting unreasonably; from her point of view she was not acting unreasonably. Each insisted on their own point of view and hence the marriage came to an end.

PILCHER J. said that he agreed with every word that had been said by DENNING L.J. on the question of onus, but it seemed to him that in the case of a difference of opinion between the spouses as to the place of the matrimonial home, someone must have the casting vote.

Appeal dismissed.

Solicitors for the husband: *Peacock & Goddard, for Goodman & Kent, Portsmouth.*

Solicitors for the wife: *Hewitt, Woollacott & Chown, for Swinburn G. Wilson & Son, Newcastle-on-Tyne.*

C. G. M.

TUCKER *v.* TUCKER.

1948
Oct. 14.

Hodson and Pilcher JJ.

Divorce — Re-hearing — Whether public interest requires a re-hearing — Application by respondent—Laches of respondent—Application for re-hearing refused—Matrimonial Causes Rules, 1947, *r.* 36, *sub-r.* 1.

On an application for a re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged, the Divisional Court will consider whether or no there is material before it upon which it is reasonable to suppose that an injustice may have been done, assuming in the applicant's favour that the material put forward is accurate.

In January, 1948, a husband petitioner filed a petition for divorce on the ground of cruelty. The petition was duly served on the respondent by registered post, and she completed and returned the memorandum of appearance. In that memorandum she stated that she did not wish to answer the petition, but wished to be heard as to costs (which were not in fact claimed) and alimony. She was informed of the date of the hearing; but she was neither present nor represented when a decree nisi was pronounced on the prayer of the petitioner on June 3, 1948. On July 12, 1948, however, she gave notice of motion as a poor person to set that decree aside, alleging that in December, 1947, the petitioner had condoned the cruelty alleged and that, although she had applied for a poor person's certificate before the hearing, that certificate was not issued until after the decree nisi had been pronounced.

Held, that on the material before it the court had no good reason to believe that the husband had wrongly succeeded in his suit, and that it was not in the public interest to order a re-hearing.

Winter v. *Winter* [1942] P. 151 considered and distinguished.

Per PILCHER J. The court will consider whether the new matter put forward so changes the complexion of the cause as to satisfy the court that on that material the order originally made would, or probably would, have been different.

WIFE RESPONDENT'S application under r. 36, sub-r. 1, of the Matrimonial Causes Rules, 1947, for a re-hearing of an undefended matrimonial cause heard by a judge alone where no error of the court at the hearing was alleged. The jurisdiction of the Divisional Court, though referred to, was not questioned.

The parties were married in 1933 in Jersey. In March, 1941, they separated, and in August, 1941, an order was made against the husband on the ground that he had wilfully neglected to maintain his wife. The husband continued to pay maintenance to June, 1948.

In January, 1948, the husband filed a petition for divorce on the ground of cruelty, alleging acts of violence since the early days of the marriage. This petition was served on the respondent in Jersey by registered post on February 27, and she completed the memorandum of appearance on March 2. In reply to the question " Do you intend to answer the Petition?" she wrote " No " ; but she said that she wished to be heard on the question of costs (which were not in fact claimed, although the question had not been struck out from the memorandum) and on the matter of alimony. She gave the name of a firm of solicitors in England as the address to which communications should be sent. (These solicitors did not in fact act for her.) On May 26 the petitioner's solicitors wrote a registered letter to the respondent, care of the address which she had given, and told her that the case would be heard on June 3 ; the letter was forwarded, and she signed a receipt for it on the standard post office form acknowledging receipt thereof. On June 3 the case was heard in the undefended list and a decree nisi was pronounced.

On July 12, 1948, the respondent through her solicitors gave notice of motion as a poor person " to set aside the decree nisi " . . . . on the ground that the petitioner did not disclose to " the court that he had condoned the cruelty alleged in his " petition by living and sleeping with the respondent from the " 11th day of December, 1947, until the 16th day of December, " 1947, and on the further ground that when the respondent, " who was then living at Jersey in the Channel Islands, was " served with the petition herein . . . . she applied for a " Poor Persons' Certificate in order to obtain legal advice on " the question of defending the said petition, but the said " certificate was not issued to her until 14 days after the decree " nisi herein had been pronounced and being ignorant of the " proceedings did not appear at the hearing of the said petition."

In her supporting affidavit the respondent said that she had consulted her Jersey lawyer when she was served with the petition and on his advice had signed the memorandum of appearance and the acknowledgment of service. She had then written to a firm of solicitors in England who advised her, in view of her financial circumstances, to communicate with the Poor Persons' Committee of the Law Society. Her application form was forwarded on April 24 and she paid five weekly instalments of 1*l*. between May 8 and June 7. On June 17 a poor person's certificate was issued and solicitors were appointed. She alleged that the petitioner had arrived without warning one evening at the house at which she had been living in Jersey with her parents since 1945 and that " on that night

1948

TUCKER
v.
TUCKER.

"(December 11, 1947) and on the following five nights he slept "with me in the same bed and each night he requested to have "intercourse with me but I refused. On December 16 he had "left for England. During his stay, she continued, he had "made no reference to any allegations of cruelty made by him "in his petition, which are untrue." (This was the only denial of cruelty in the affidavits before the court.)

The petitioner admitted by affidavit that he had visited Jersey on business in December, 1947, and said that he had met a brother of his wife by accident. He had always been on good terms with his wife's family, and they went to visit her mother. He admitted that he had stayed at the house and that he had met his wife there: but he denied that he had shared his wife's room.

Peter Boydell for the applicant wife. There is evidence of condonation which the petitioner withheld from the court, and in view of the special factors of public policy which have to be considered in matrimonial causes the case should be re-heard: see *Winter* v. *Winter* (1). Moreover, the wife had not had adequate legal advice until after the decree nisi had been pronounced, owing to the delay in her obtaining a poor person's certificate.

John B. Gardner (*R. J. A. Temple* with him) for the husband. Although the difficulty in which the respondent to the application is placed by *Winter* v. *Winter* (1) is appreciated, that case may be distinguished, for on the evidence before the Divisional Court in that case it appeared that the petitioner might have deserted the respondent, and there was evidence that she had in fact left him. In *Peek* v. *Peek* (2) there was also a strong suggestion that the petitioner had misled the court concerning the alleged desertion. There was no real evidence in the present application that the court had been so misled, and even on the respondent's affidavit it might be doubted whether there had been condonation. The applicant had been guilty of laches, and although in matrimonial causes laches were not in themselves sufficient to prevent a re-trial if the evidence appeared to warrant it, yet they reflected on the credibility of the applicant and must be considered by the court. See also *Lester Jones* v. *Lester Jones and Stirrett* (3) in which the Divisional Court had referred with approval to *Durant* v. *Durant* (4) and refused a re-hearing; and see *Taylor* v. *Taylor and Darg* (5), in which,

(1) [1942] P. 151.
(2) [1948] P. 46.
(3) (1920) 123 L. T. 584.
(4) (1824) 2 Add. 267.
(5) (1899) 81 L. T. 494.

although a re-trial in fact was ordered, the principles in *Anderson* v. *Titmas* (1), where the court would not grant a re-hearing unless there were a reasonable probability that the fresh evidence would result in a different verdict, were applied.

Peter Boydell in reply.

HODSON J. referred to the nature of the application and to the manner in which the respondent had completed the memorandum of appearance and continued: It is quite clear, from that memorandum, that this applicant was concentrating her mind at the time not on whether there was to be a divorce or not, not on whether she was guilty of cruelty or not, but on the financial aspects of the case, namely, whether she was going to get alimony and whether she was going to be ordered to pay costs. The question of costs was immaterial, but the question of alimony is a live question, because it appears from her affidavit sworn in support of this application that she has since the year 1941 been in receipt of maintenance from her husband under a court order, and that these payments ceased in June, 1948, the month in which the decree was pronounced. (His Lordship then referred to the facts as to the wife's application for a poor person's certificate and continued :) She now seeks to say that the decree ought never to have been pronounced against her. The reason given in the notice of appeal is that there was condonation, that being the legal bar to divorce on which she relies ; but it is right to add that in the affidavit in support of this application she does deny that she treated her husband with cruelty, which would also be a bar to a decree, if her denial were accepted.

If anyone was guilty of laches, this applicant was so guilty. She stated quite clearly (and there is no reason to suppose she did not understand what she was doing), that she did not intend to answer the petition—in other words, that she wanted the divorce to go through. At first sight one might well have been far from thinking that this application should succeed, and some of the authorities would lead one to take that view. *Durant* v. *Durant* (2), which was a decision of the Arches Court, strongly supports that view. The headnote is as follows: " When the court is prayed to rescind the conclusion of a cause, " in order to fresh matter being pleaded, it always requires to " be satisfied both that the party praying it is in no laches and " that the measure prayed is one essential to the ends of justice.

(1) (1877) 36 L. T. 711.

(2) 2 Add. 267.

"It always further requires that some special ground be laid "(as that of such fresh matter having newly come to the party's "knowledge, or as the case may be) to found the prayer," and Sir John Nicholl in his judgment said (1): "Applications "of this nature, for obvious reasons, are seldom acceded to by "the court; though, undoubtedly, it is competent to the court "to accede to them. But in order to do this it ought, at least, "I think, independent of any special ground laid, first to be "satisfied, both that the measure prayed is one essential to the "ends of justice; and that the necessity for praying it has "resulted from no laches on his part in whose behalf it is "prayed. In the absence of either, a fortiori of both, those "requisites, the court is bound to reject such a prayer, if for "that reason, or those reasons, only—especially in a case, the "proceedings in which justify a suspicion, that the measure "itself may be one of several contrivances to protract and "impede the decision of the principal cause." *Durant* v. *Durant* (1) was decided at a time when there was no divorce a vinculo except by Act of Parliament, but it was referred to comparatively recently in *Lester Jones* v. *Lester Jones and Stirrett* (2), a particularly remarkable case of lying by, where a co-respondent, against whom damages had been awarded, delivered under the corresponding rule to that in force to-day, a claim for a re-hearing when he found that the damages were rather higher than he had expected, and received short shrift from the court. In the course of his judgment Sir Henry Duke P. said: "It is not enough that the successful party has "given some evidence that would have been disputed on a "re-hearing. If that were the law, hardly a judgment would "stand. None of the grounds recognized by Sir John Nicholl "in *Durant* v. *Durant* (1) and which are substantially the same "ground on which re-hearings are allowed by the courts of "common law, is present here. There must, as was there "pointed out, be no laches on the part of the applicant. But "here there was. He took his risk of the view that the court "would take of his conduct, and lay by." That was a case in which the only matter for consideration was the amount of damages which the co-respondent was ordered to pay and the question whether or not the divorce should stand did not arise; but since that time this court has undoubtedly taken a different view where the question whether or not a divorce should stand

---

(1) 2 Add. 267, 269.

(2) 123 L. T. 584.

1948

TUCKER
v.
TUCKER.

Hodson J.

has arisen, which it is not for me to question. That view is to be found in the decision of the Divisional Court, composed of Langton and Henn Collins JJ., in *Winter* v. *Winter* (1). That case was also a very remarkable case of lying by on the part of a husband respondent who had been charged with desertion. He had quite deliberately allowed the case to go undefended against him. He moved the court for a re-hearing on the grounds that he had not deserted his wife and that the material facts had not been before the trial judge. It is sufficient to say that he had deliberately abstained from defending the case, although on the material and correspondence which he put before the Divisional Court a very strong prima facie case was made out that, so far from the wife being in a position to say that he had deserted her, she had deserted him. In dealing with the application, and having before it *Lester Jones* v. *Lester Jones and Stirrett* (2), to which I have just referred, the court came to the conclusion that notwithstanding the existence of laches, notwithstanding the deliberate inactivity of the applicant, the public interest demanded that justice should be done, and that the applicant should have an opportunity of having his case heard, in order that what appeared to the court to be the true facts should be before it. Langton J. in the course of his judgment said (3): "The husband asks for a re-hearing of the "wife's petition on the ground that the decree was against the "justice of the case in that it was untrue that he ever deserted "his wife, and that he now wishes to put the real facts before "the court. Obviously, such an appeal, so far as the husband "is personally concerned, has no vestige of merit. In the full "possession of his senses and with competent legal advice, he "determined not to defend the petition but to let the matter "go. So far, therefore, as he personally is concerned there "can be no reason in law or in justice why he should now be "allowed to retract that determination and put his wife to the "trouble, expense and annoyance of a re-hearing. In matri-"monial matters, however, there is always something more to "be considered than the mere individual merits of the parties. "The Matrimonial Causes Act, 1937, has laid stress upon the "duty of the court to consider the public as well as the private "interests involved in matrimonial matters, and it must also "be remembered that a question of status is involved and that "the position of any child or children of the marriage is deeply

---

(1) [1942] P. 151.

(2) 123 L. T. 584.

(3) [1942] P. 151, 153.

" affected by a decree of dissolution. Accordingly, it would " not be right to treat this matter as if it were a mere private " piece of litigation in any other division of the Supreme " Court. Applications for re-hearing under r. 36, sub-r. 1, " are limited in two ways." After dealing with the rule he continued (1): " The point of the husband's counsel through- " out, and it is a strong one, has been that it cannot be in " the public interest to allow to stand a divorce decree which, " on the evidence before us, would appear to have been granted " on an erroneous basis, and he contended that personal " laches, negligence or even delinquency on the part of the " husband is wholly immaterial. In my view, if, without " attempting to determine the matter finally, this court has " good reason to believe that the husband did not desert the " wife, we ought in the public interest to order a re-hearing " if we have power to do so." In referring to *Lester Jones* v. *Lester Jones and Stirrett* (2) Langton J. said (1): " The court " refused to grant the re-hearing, but no suggestion was made, " either by the respondent or by the court itself, that there " was not power on the part of the court to grant the re-hearing " if it thought that course desirable."

That judgment was referred to recently in *Peek* v. *Peek* (3), and the learned President expressly adhered in that case to what was said by Langton J. on this topic. He said (4): " The court, if I may say so, was clearly right in coming to the " view that the public interest in these matters transcended any " technical rules about shutting out litigants who had deliberately stood by, and impelled the court to allow full " investigation of the alleged new case."

I have referred to these cases in order to emphasize the fact that this application is not being dealt with on anything approaching a technical ground, or even on the ground of what might be regarded as natural justice as between litigants, because, if that had been so, this application could well be rejected on the ground that this applicant has no merits whatever. With her eyes open she decided not to defend the case, and now, having thought the matter over and having apparently come to the conclusion that her financial future will be imperilled if she does not somehow get rid of this decree, she has decided to get the matter reopened. But I am not dealing with this application on that basis. I am dealing with it on the basis that I think was adopted by the Divisional Court in *Winter* v. *Winter* (1), because there it was said by Langton J. that a re-hearing would be granted if it was thought desirable. And in an earlier passage he said (2): "If, without attempting "to determine the matter finally, this court, on the material "before it, has good reason to believe that Mr. Winter did not "desert his wife, we ought, in the public interest, to order a "re-hearing if we have the power to do so." This court would, therefore, appear to be put into this position, that it has to come to a conclusion whether or not there is material upon which it is reasonable to suppose that an injustice may have been done; that is, material put forward by the applicant, and assuming in the applicant's favour that all she says is accurate. We have no transcript of the evidence, and we are left in the dark as to what exactly was proved, but the petitioner's case, as set out in the petition (which after all was sworn to by affidavit) discloses a series of acts of violence directed against him by the wife which, if established, could properly be held to amount to cruelty. I have already indicated that this applicant did not seek to answer the charges of cruelty when they were first put before her, and I now refer to the fact that in the notice to this court what she wishes to draw our attention to is not that she has not been guilty of cruelty, but that such cruelty has been condoned; so that even now, what she is emphasizing is a defence of condonation, which she claims to be available to her. It is necessary for me to give that adumbrated case some examination.

---

(1) [1942] P. 151, 154.
(2) 123 L. T. 584.
(3) [1948] P. 46.
(4) Ibid. 57.

Her case is this: She says that she and her husband parted in 1941, and that she left him. Nothing is said about what happened in the succeeding years, although we know that she got a maintenance order in 1941 which was varied in 1942; we do not know what contact, if any, she subsequently had with her husband until December, 1947, when, according to her affidavit in support of this application her husband visited her in Jersey at a time when he was obviously contemplating these proceedings (the petition is dated January, 1948). She had returned to her home in Jersey after the war was over, and the husband, who did not normally live there, had visited the home of his wife in order, apparently, to see his wife's mother. The wife was there, and, according to her, there was a friendly meeting; although no intercourse took place they occupied the same room for a few days, and he wanted to have sexual intercourse with her, but she refused. I have already said that one must take, for the purposes of this application, everything that she says as being accurate, although it is disputed by the husband in his affidavit; and I am bound to say that that does not, to my mind, satisfy me that any cruelty if in fact it was committed, was condoned. It would, no doubt, if one were trying the case, make one feel that the husband who was complaining of cruelty had probably not been under a very strong sense of grievance, if that was his action in 1947; but it does not establish the legal bar which is referred to in the notice of motion as being the reason why this court should order a re-hearing.

---

(1) [1942] P. 151; 111 L. J. (P.) 95.

(2) 111 L. J. (P.) 96.

I need not refer to other matters which are not referred to in the notice of motion. I have already said that although she denies cruelty, she does not put that forward in the notice at all. There are other matters, I see, on looking at the papers, namely, long delay from 1941, when the parties separated, until 1948, when the petitioner took proceedings. I do not know the explanation. There may be a perfectly good one; he may have been serving in one of the Forces, he may have been separated from his wife through one of the circumstances of the war by one reason or another, he may have been prevented by lack of means. I do not know; but these are only matters which in essence go to the weight of the evidence which he gave on the main issue.

As I have said, there is no merit. It is obviously a case in which the only concern, so far as I can see, is that this applicant may be in a better position to protect her own pocket. But she has already an order in her favour in the police court, which she is still in a position to sustain, if she can, and she is in no worse position, so far as the machinery of this court is concerned, in making an application for alimony which can be dealt with on its merits, than she would be if she succeeded. No doubt she feels that if she had not got against her this finding of cruelty she would be in a stronger position on those applications, but that is not a matter which can assist this court in coming to a conclusion in her favour.

For these reasons I have come to the conclusion that this court ought not to order a new trial. I will put it this way: That on the material before it this court has no good reason to believe that the husband wrongly succeeded in his suit, and we do not think that it is in the public interest in this case to order a re-hearing. I will use the language of Langton J. in *Winter* v. *Winter* (1): I do not think it "desirable." For these reasons, in my judgment, this application fails.

PILCHER J. I agree, and I propose to add very little. Procedure under the Matrimonial Causes Rules, 1947, r. 36, sub-r. 1, where no error of the court is alleged, has always been regarded as a procedure which should be exercised with caution. Apparently, when the ecclesiastical courts were concerned with divorces a mensa et thoro, and where there was no question of a change of status, one of the pre-requisites under the analogous procedure in those days was that there should have been no laches on the part of the applicant. As my Lord has pointed out, it is quite clear, at any rate since *Winter* v. *Winter* (1), that this principle no longer applies, and that it is now open to a respondent who has lain quiet whilst the petitioner alleged matters which to his knowledge were false, to come forward under this order and make an application to the court and produce material to show that the petitioner hoodwinked the court with the respondent's approval and that the result has been a miscarriage of justice. That is what the decision in *Winter* v. *Winter* (1) amounts to, and the reason why the court would entertain in a proper case an application under the rule and rescind a decree, is because the court is concerned primarily with matters of public policy and the status of the parties, rather than with the particular quarrel between the individuals. It is concerned to see that in matrimonial matters, where questions of status are involved, any order which it makes is made upon the true facts.

I do not propose to read the passages from the judgment of Langton J. to which my Lord has already referred, but they do, I think, as he has pointed out, make it clear that one of the matters which the court has to consider, when an application under this rule is made to it, is whether the new matter put forward so changes the complexion of the case as to satisfy this court that if that material had been before the court which dealt with the matter originally the order made would, or probably would, have been different.

Having looked at such evidence as has been put forward on behalf of the applicant in this case, I entirely agree with my Lord that it would be quite wrong for this court, on that material, to say that this is a proper case in which to rescind the order originally made. I am left profoundly unconvinced that the wife would succeed if the case were re-heard. I am not even satisfied that she wants the order varied, except as to costs. If she desires to have this decree set aside it is simply and solely that she hopes that she will thus be in a better position to obtain some support from her husband. I do not think that any of the material which has been put before us justifies us (and we have a discretion), in setting aside the decree which has been obtained.

---

(1) [1942] P. 151; 111 L. J. (P) 95.

For those reasons and the reasons given by my Lord I agree that this application should be dismissed.

Application dismissed.

Solicitors: *Kinch & Richardson, for R. M. Galsworthy, Perrier & Co., St. Helier, Jersey; Cree, Godfrey & Wood, for Leather & Stevenson, Aylesbury.*

J. B. G.

HARTHAN v. HARTHAN.

C. A.

1948
June 11, 17, 18, 21, 22, 23, 24; *July* 26.

Lord Merriman P., Bucknill L.J. and Hodson J.

Husband and wife—Non-consummation of marriage—Impotence of husband petitioner—Whether petitioner can plead his or her own impotence—Court to act as nearly as possible in conformity with principles upon which ecclesiastical courts acted in nullity cases—Applicability of pre-Reformation canon law.

A husband had been unable mainly owing to psychological reasons to consummate the marriage. The wife had not repudiated the marriage contract. Twenty-two years after the ceremony of marriage had taken place, during at least twelve years of which period the parties had voluntarily lived apart, the husband brought a petition for nullity on the ground of his own impotence.

Held that (1.) in accordance with s. 23 of the Matrimonial Causes Act, 1857, the principles on which the court should act in questions of nullity of marriage (apart from the question of nullity on the ground of wilful refusal to consummate the marriage) should be as nearly as possible conformable with the principles on which the ecclesiastical courts had acted; (2.) the origin of the jurisdiction of the ecclesiastical courts was to be found in the pre-Reformation canon law, but only so far as that law stood uncorrected by contrary Acts of Parliament or the common law and custom of England; (3.) by the pre-Reformation canon law an impotent spouse could plead his or her impotence, provided

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

(*a*) he or she did not know of his or her impotence at the time when the ceremony of marriage took place and had not deceived the other spouse and (*b*) the other spouse at the time of that ceremony did not know of the petitioning spouse's impotence; (4.) neither the statute nor common law of England had interfered with the pre-Reformation canon law concerning the right of an impotent spouse to plead his or her own impotence; (5.) the principle which had been first introduced in certain Irish cases notably by *A.* v. *A.* (*sued as B.*) (1887) 19 L. R. Ir. 403 adopted in *McM.* v. *McM.*, *McK.* v. *McK.* [1936] I. R. 177 that an impotent petitioner had to prove that the respondent had repudiated the marriage contract before he or she could successfully plead his or her own impotence, could not be supported, but the sounder view was that the reaction of the respondent to the situation created by the impotence of the petitioner should be taken into account in considering whether the circumstances of the case as a whole, including the respondent's attitude, were such as to debar the impotent spouse from suing; (6.) therefore, the husband was in the circumstances of the case entitled to plead his own impotence, for as he did not know of his defect until after the date of the marriage ceremony, he had not deceived the wife, the wife did not know of the defect until after that date, and there was no other reason why he should be debarred from suing.

Norton v. *Seton* (1819) 3 Phill. 147, distinguished and explained.

The principles laid down in *F.* v. *F.* 1945 S. C. 202, approved and applied.

APPEAL by the husband petitioner from the judgment of Mr. Commissioner Eddy, who had dismissed his petition for nullity. The parties went through a ceremony of marriage on April 27, 1925. From the very beginning, except on rare occasions, the spouses occupied separate bedrooms. Such attempts as the husband made at the beginning of their cohabitation to consummate the marriage entirely failed and he alone was responsible for such failure. By the year 1931 he had abandoned the attempts. In that year they went to China, but after twelve months the wife returned to England for reasons of health, and they were thus necessarily separated until the husband's return to England in 1937. They then lived together for another two years or so without any further attempts by the husband to consummate the marriage.

From the time of the outbreak of the war in 1939 until 1946, they voluntarily lived apart, he for the purpose of war service as chaplain in the Royal Air Force and later on of work as a probation officer and she for the purpose of war service in the Women's Auxiliary Air Force. They saw very little of each other during that period.

In 1946 he received medical advice that as he was physically normal apart from some under-development of the testicles, his failure to consummate the marriage was due mainly to psychological causes and that he should, therefore, renew his attempts to consummate the marriage, and that with the co-operation of his wife he might be cured. Accordingly the husband began again to live with the wife. On a few occasions he made attempts to consummate the marriage and according to his evidence there was reason to suppose that he would have been successful if the wife had been willing to assist him, but she refused all assistance and told him that as they had not experienced the sexual side of marriage for all those years she did not want to start experiencing it then.

The wife's refusal to assist the husband to consummate the marriage twenty-one years after the marriage ceremony had taken place induced him to plead by para. 3 of the petition that the wife had wilfully refused to consummate the marriage. In para. 4, however, he alleged in the alternative that ever since the time of the marriage ceremony he had been incapable of consummating the marriage and that at that time he was unaware of his incapacity, but that the wife had repudiated the relationship of wife, and the obligation of the marriage contract.

The commissioner held that the wife had not wilfully refused to consummate the marriage. He further held that in the absence of authority for such a proposition a man was not entitled to petition for a decree of nullity merely on the ground of his own incapacity: and, declaring himself in doubt as to whether the appellant was or was not incapable of consummating the marriage, he dismissed the petition.

The Court of Appeal came to the conclusion that the commissioner was right in finding that the respondent had not wilfully refused to consummate the marriage. They also found that ever since the ceremony of marriage took place the appellant was impotent mainly on psychological grounds in relation to the wife at any rate, and was, for that reason, incapable at any time of consummating the marriage, and that the respondent had never repudiated the relationship of wife or the obligations of the state of marriage. The question remained whether as a matter of law the appellant was entitled to plead his own impotence as a ground for seeking a decree of nullity.

As the respondent did not defend the petition, the King's Proctor at the request of the court instructed counsel to assist the court in deciding this point of law.

H. J. Phillimore for the appellant, the husband. I concede that there is no evidence of repudiation of the marriage contract by the respondent, but I submit that a spouse can petition on the ground of his or her incapacity irrespective of the question whether the other spouse has repudiated the marriage contract.

The decision in *Norton* v. *Seton* (1) quoted by text books as an authority for the proposition that a spouse cannot petition on the ground of his or her incapacity was based on the facts of that case which showed that the petitioner had known of his own defect and had deceived the respondent. Sir John Nicholl's observations in that case so far as they went beyond the facts were obiter dicta.

In the present case the appellant was ignorant of his defect at the time when the marriage was solemnized.

The canon law as referred to in the argument in *Norton* v. *Seton* (1) is clear and is still the law of England and shows that such a petition is competent. Prior to the Reformation the canon law, i.e., the jus commune of the Western Church (hence the phrase "common law")—was the only law governing nullity and other matrimonial issues and was accepted and applied without reservation by the ecclesiastical courts.

The theory that the ecclesiastical courts in England before the Reformation applied only such parts of the canon law as they chose has its origin in the appendix by Bishop Stubbs to the Report of the Ecclesiastical Courts Commission, 1883, and has been shown to be entirely fallacious (Maitland Canon Law in the Church of England, 1898, esp. pp. 2, 23, 33, 38, 45; Holdsworth "History of English Law," vol. 1, 1922, pp. 582, 587; Zachary Brooke, "The English Church and the Papacy" (1931), p. 113, also the recent report of the Archbishop of Canterbury's Commission "The Canon Law of the Church of "England," 1937, pp. XI/XII, also pp. 36/7, 40).

The canon law is best stated in Sanchez Disp. (1626) Lib. VII, Disp. 114. Sanchez quotes a number of authorities which lay down certain principles in respect to this subject. Those principles he summarized as follows:

(1.) A spouse can always petition if he or she has an interest, i.e., if he or she has suffered injury.

(2.) An impotent husband can, therefore, petition if his incapacity proceeds from maleficium, provided he does not know of his defect at the time of the marriage, for otherwise he would benefit from his own deceit. Maleficium includes all forms of incapacity other than those which render a man incapable of ever consummating a marriage. Where his incapacity proceeds from maleficium it is probable that he would be capable of consummating another marriage. If he is entirely incapable of ever consummating a marriage with any woman then he is frigidus and can suffer no hardship if he is required to maintain his wife "tamquam sororem."

---

(1) (1819) 3 Phill. 147.

(3.) The element of public policy, namely, that spouses should not be held to a marriage whereby they are driven to adultery, is of decisive importance. In this case the husband's incapacity was due to psychological and not to physical causes and constituted maleficium.

At the Reformation, s. 7 of the Act of 1533 (25 Hen. 8, c. 19), required the submission of the clergy to the laws, statutes and customs of the realm, provided that the canons "which be not "repugnant to the law, statutes and customs of this realm nor "to the damage or hurt of the King's prerogative royal shall "now still be used and executed as they were afore the "making of this Act," pending the decision of the commission set up to examine and codify the canon law. The commission's report never became law and, therefore, the pre-Reformation canon law continued in force save in so far as it could be shown to be repugnant to the law and customs of the realm. There is nothing in the canon law on nullity so repugnant either to the law or customs of the realm or to the King's prerogative. There is no suggestion that the pre-Reformation canon law on nullity did not remain binding on the ecclesiastical courts after the Reformation. The burden of proof of repugnancy is in any case on the King's Proctor. In *Norton* v. *Seton* (1) precedents were sought, but the archives of the Arches Court were so chaotic that in 1819 there were apparently records covering less than a hundred years, and the fact that these did not disclose a petition of nullity by a spouse on the ground of his or her own incapacity is at least inconclusive. *Norton* v. *Seton* (1) was doubted in *Miles* v. *Chilton* (2), although admittedly Dr. Lushington had been junior counsel for the petitioner in the former case and his views may to that extent perhaps be regarded as slightly prejudiced.

A. v. *A*. (3) imported the doctrine of repudiation for which no warrant is quoted or appears. There seems no warrant for this doctrine where the respondent's interests are amply protected by the long-established rules that the petitioner must come with clean hands and must not have approbated the marriage.

---

(1) 3 Phill. 147.

(2) (1849) 1 Rob. Ecc. 684, 694 to 699.

(3) (1887) 19 L. R. Ir. 403.

That case was followed in *Davies (otherwise Mason)* v. *Davies* (1) and *McM.* v. *McM. McK.* v. *McK.* (2). The judgment in the latter case of thirty-eight pages proceeds on the unexplained acceptance of Pothier in Traité du Contrat de Mariage (1768) as the authority par excellence.

The Court of Appeal did not accept the need for repudiation in *G.* v. *G.* (*falsely called K.*) (3) and that appears to be a decision in favour of a petition such as this.

S. G. v. *W. G.* (4) and *F.* v. *F.* (5) show that a petition such as this would be accepted in Scotland. The judgments of the Court of Session accept the position that incapacity is itself an injury and without reference thereto follow the reasoning of the pre-Reformation canonists.

It is undesirable that the law should differ across the border. The reasoning of the Scottish cases is right, accords with the canon law which is still the law of England in nullity and should be followed.

J. E. S. Simon for the King's Proctor. The ecclesiastical courts were not free to disregard any part of the papal legislation, although the lay courts might intervene by writ of prohibition to prevent the enforcement of certain specific enactments. The ecclesiastical law administered in England before the Reformation was therefore the code contained in the Corpus Juris Canonici. That code in its full development before the Reformation, permitted an impotent spouse to petition for nullity on the ground of his or her impotence. Corpus Juris Canonici Decret. Greg. IX., Lib. IV., Tit. XV., C. I; Esmein, Mariage en Droit Canonique (1891) pp. 236–7, 241: see also Codex Juris Canonici, 1917, Canon 1068. That code was a logical extension of the Roman Catholic view of marriage. Marriage was a sacrament and it was therefore indissoluble. Impotentia coeundi was a "impedimentum diremens," which rendered the marriage absolutely void. There was therefore nothing to prevent the impotent spouse from seeking a declaration of its nullity. Esmein, Mariage en Droit Canonique (1891), pp. 64–6, 83, 85, 100, 112, 121, 132, 238–241, 258.

At the Reformation there occurred two fundamental changes which destroyed the whole juridical basis on which the canon law of nullity was erected. Firstly, marriage ceased to be a sacrament, and became a contract giving rise to a status: Thirty-nine Articles, article 25; *Fender* v. *Mildmay*, per Lord Russell of Killowen (1). Secondly, there arose, owing to the interference of the common law courts to prevent a marriage being declared void after the death of one of the parties, a distinction between void and voidable marriages; the marriage of persons subject to a canonical disability (including impotence) became voidable only: *Ray* v. *Sherwood* (2); *A.* v. *B.* (3); *De Renneville* v. *De Renneville* (4). Owing to this displacement of the juridical basis for the rule of the canon law that a spouse could petition on the ground of his own impotence, the rule itself must be considered to be abrogated: cessante ratione cessat ipsa lex.

---

(1) [1935] P. 58
(2) [1936] I. R. 177.
(3) (1908) 25 T. L. R. 328.
(4) 1933 S. C. 728.
(5) 1945 S. C. 202.

Further, the Reformation legislation provided that the canon law should continue to be administered by the ecclesiastical courts as customary law only; indeed, the legislative fiction was that it had never been otherwise: (1533) 25 Henry 8, c. 19, ss. 3, 7; (1543) 35 Henry 8, c. 16, s. 3. There is, as a result, an onus on a party relying on a provision of the canon law to satisfy four conditions: firstly, that it was in use in England up to the Reformation; secondly, that it has continued to be uniformly recognized and acted on since then; thirdly, that it is not in conflict with the common or statute law; and fourthly, that it is reasonable: Vol. XI Halsbury's Laws of England, 2nd ed., pp. 426–7; Burn, Ecclesiastical Law (1842) 9th ed., Vol. II, pp. 39, et seq, 51, et seq.; The Canon Law of the Church of England, Report of the Archbishop of Canterbury's Commission, 1947, pp. XII., 46–8, 50, 57, 59; *Caudrey's* case (5); *Dalrymple* v. *Dalrymple* (6); *Proctor* v. *Proctor* (7); *Norton* v. *Seton* (8); *Reg.* v. *Millis* (9); *Hope* v. *Hope* (10); *Exeter* (*Bp.*) v. *Marshall* (11); *Mackonochie* v. *Lord Penzance* (12). It is not contended that the rule of the canon law is unreasonable, since this court has power to make financial provision for a respondent; and with regard to the first condition, it has already been shown that it has been fulfilled.

(1) [1938] A. C. 1, 27.
(2) (1836) 1 Curt. 173, 188, 199.
(3) (1868) L. R. 1 P. & M. 559.
(4) [1948] P. 101, 110-2, 113, 119.
(5) 5 Co. Rep. 1.
(6) (1811) 2 Hag. Con. 54, 81.
(7) (1819) 2 Hag. Con. 292, 296, 299, 301.
(8) 3 Phill. 147, 163.
(9) (1843) 10 Cl. & Fin. 534, 678.
(10) (1858) 1 Sw. & Tr. 94.
(11) (1868) L. R. 3 H. L. 17.
(12) (1881) 6 App. Cas. 424, 446.

C. A.
1948
HARTHAN
v.
HARTHAN.

As to the second condition, namely, that the rule of the canon law which the petitioner now seeks to establish must be shown to have been uniformly recognized and acted on since the Reformation, it is submitted that the evidence is to the contrary. Of the text-books, Clarke's Praxis (1684), Godolphin's Reportorium Canonicum (1680) and Consett's Practice (1708), do not mention the point. Ayliffe's Parergon (1726), p. 230, states that a spouse may petition for nullity on the ground of his own impotence; but his only authority for the proposition is the papal decretal already cited. Oughton's Ordo Judiciorum (1738) has a footnote to Tit. 193, par. 17, "Hic pergit MS. "Antiq. 'Et pars gravata agere potest, in causa nullitatis "'matrimonii'." Oughton's "ancient manuscripts" dated back to 1590–7: see Dibden's Notes on the Reformatio Legum Ecclesiasticarum, 1912, p. 47. "Gravata" is used metaphorically; it could mean either, "aggrieved" or "afflicted": the former is closer to its normal use in classical and mediæval Latin, but if that were its meaning one would have expected the author to have written "Et sola pars gravata agere potest." Poynter's Marriage and Divorce (1824), p. 131, seems to admit the right of a spouse to petition for nullity on the ground of his own impotence. Shelford's Marriage and Divorce (1841), p. 208 and Burn's Ecclesiastical Law, 9th ed. (1842) by Sir Robert Phillimore, vol. II, p. 500, state that there is no such right, citing *Norton* v. *Seton* (1). Fraser's Husband and Wife (1876), vol. I, p. 99 and Bishop's Marriage and Divorce (1891,) vol. I, p. 341, come to opposite conclusions; the former denies and the latter admits the right of an impotent spouse to rely on his own disability. *Norton* v. *Seton* (1) is not really a direct authority on the point, since Sir John Nicholl held there that the petitioner must have been aware of his incapacity at the time of the marriage; but it establishes, first, that, so far as the knowledge of the court and counsel went and as a search of the Arches Book showed, there was no evidence of any previous case where a petitioner had sought to annul a marriage on the ground of his own impotence; secondly, that the fact that the canon law allowed the right is inconclusive; and thirdly, that the rule that no person may take advantage of his own wrong is a relevant principle in these matters. *G.* v. *G.* (*falsely called K.*) (2), *G.* v. *G.* (3) and *H.* v. *H.* (*otherwise N.*) (4) are distinguishable since in those cases the impotent spouse was

(1) 3 Phill. 147.
(2) 25 T. L. R. 328.
(3) [1912] P. 173.
(4) (1929) 45 T. L. R. 618.

granted a decree on the ground, not of his or her own impotence, but of that of the other spouse. The dicta in the remaining cases are obiter and are conflicting : (counsel referred to *Miles* v. *Chilton* (1) ; *B–N.* v. *B–N.* (2) ; *H.* v. *C.* (3) ; *A.* v. *B.* (4) ; *Halpin* v. *Boddington* (5) ; *H.* v. *H. Ex parte* (6)). The Irish Court of Appeal in *A.* v. *A.* (7), while holding that prima facie an impotent spouse may not petition on the ground of his own incapacity, introduced a rider to this, namely, that he could do so if the other party had repudiated the marriage ; this was followed in *McM.* v. *McM.*, *Mc.K.* v. *McK.* (8), where the petition was dismissed on the ground that the respondent's conduct did not amount to repudiation, and in the Australian cases of *B.* v. *M.* (9) and *B.* v. *B.* (10) : see also *Davies* (*otherwise Mason*) v. *Davies* (11). The Irish cases are in the same system of jurisprudence as is applied in this court : *Usher* v. *Usher* (12), and should be followed.

The Scottish Inner House in *F.* v. *F.* (13), following dicta in *S. G.* v. *W. G.* (14), held that, quite apart from any question of repudiation, the impotent spouse may be granted annulment of the marriage on the ground of his own incapacity. But that decision is in a system of matrimonial jurisprudence which differs in many respects from the English : Encyclopædia of the Laws of Scotland, vol. VI., pp. 9, 10, 14, vol. IX., pp. 403, 408 ; *Collins* v. *Collins* (15). It is submitted that the examination of the authorities shows that the rule of the canon law in question has not been consistently recognized, and has never been acted on in England since the Reformation.

With regard to the third condition, namely, that it must be shown that the rule of the canon law is not repugnant to any rule of statute or common law, the right now claimed runs counter to two principles of the common law. The first is the rule of estoppel, which is applicable to the law of nullity for impotence : *B–N* v. *B–N* (2) ; *G.* v. *M.* (16). The petitioner has by his conduct at the time of the marriage wilfully caused the respondent to believe that he was sexually potent, and has induced her to act on that belief so as to alter her previous position of celibacy to the married state; he is therefore precluded from averring against the respondent a different state of things (i.e., that he was impotent) as existing at the time of the marriage: *Pickard* v. *Sears* (1). (He also referred to *Freeman* v. *Cooke* (2) as to the meaning of "wilfully.")

---

(1) 1 Rob. Ecc. 684.

(2) (1854) 1 Spinks Ecc. & Ad. 248.

(3) (1860) 1 Sw. & Tr. 695, 620.

(4) L. R. 1 P. & M. 559, 562.

(5) (1881) 6 P. D. 13.

(6) (1946) 62 T. L. R. 597.

(7) 19 L. R. Ir. 403.

(8) [1936] I. R. 177.

(9) (1942) Q. W. N. 5.

(10) (1942) Q. W. N. 23.

(11) [1935] P. 58.

(12) [1912] 2 I. R. 445.

(13) 1945 S. C. 207.

(14) 1933 S. C. 735.

(15) (1884) 9 App. Cas. 205.

(16) (1885) 10 App. Cas. 171.

The second principle of the common law with which the right now claimed is in conflict is the rule that no person may take advantage of his own wrong; this, too, is applicable to nullity: *Norton* v. *Seton* (3). Impotence has been frequently described as a wrong done to the other spouse: *Greenstreet* v. *Cumyns* (4); *Briggs* v. *Morgan* (5); *B.* v. *B.* (6); *H.* v. *C.* (7); *G.* v. *M.* (8). The mere fact that sexual incapacity is also a misfortune and a source of suffering to the impotent spouse does not make it any the less a wrong to the potent spouse. That impotence must in law be considered a wrong done to the potent spouse appears also from an examination of the juridical basis of the rule that a marriage can be avoided on the ground of incapacity to consummate the marriage. Bishop's Marriage and Divorce (1891), p. 827, suggests that it is based on mutual mistake: see also Rayden on Divorce, 4th ed., p. 71; but if this were so the marriage would be void, not voidable *Cundy* v. *Lindsay* (9).

Nor can it be considered as an application of the doctrine of frustration, since the event relied on as bringing the marriage to an end (i.e., its non-consummation), has been brought about by the default of one of the parties: *Joseph Constantine S. S. Line* v. *Imperial Smelting Corporation, Ld.* (10). It is submitted that the true basis of the rule is that there is an implied condition in the contract of marriage that each party is able and willing to consummate the marriage: Poynter's Marriage and Divorce (1824) (2nd ed.), p. 123; Shelford's Marriage and Divorce (1841), p. 201; Fraser's Husband and Wife (1876) (2nd ed.), p. 83; Bishop's Marriage and Divorce (1891), p. 827.

Lord Fitzgerald in *G.* v. *M.* (11) said: "The procreation of "children being the main object of marriage the contract "contains by implication, as an essential term, the capacity for "consummation." If there is such an implied term, it follows that an impotent spouse is in default and has committed a

(1) (1837) 6 Ad. & El. 469.
(2) (1848) 2 Ex. 654.
(3) 3 Phill. 147.
(4) (1812) 2 Hag. Con. 332.
(5) (1820) 2 Hag. Con. 328, 330.
(6) 1 Spinks Ecc. & Ad. 248, 260.
(7) (1860) 1 Sw. & Tr. 605, 615, 622.
(8) 10 App. Cas. 171, 202, 203.
(9) (1878) 3 App. Cas. 459.
(10) [1942] A. C. 154, 202.
(11) 10 App. Cas. 171, 204.

wrong towards the other spouse, and that the impotent spouse cannot rely on that wrong in order to secure relief, if the potent spouse is willing to condone this wrong. But if the potent spouse " repudiates " the marriage (i.e., shows that she or he disclaims her or his remaining rights and obligations) there is no principle of law or equity which would preclude the impotent spouse from seeking a declaration of the court that the marriage is a nullity.

H. J. Phillimore in reply. Reception of this specific cause of action can be shown from Ayliffe, Parergon, 1726, pp. 229-230 and Oughton, Ordo Judiciorum, 1728, p. 286, and Poynter, Doctrine and Practice of the Ecclesiastical Courts, 1824, p. 131. Oughton uses " pars læsa " for " party " injured " so that he supports Ayliffe. Thus, the principal works of practice and theory published within two years of each other in the eighteenth century show that this petition was competent then.

Some support is also to be obtained from the opinion of Dr. Wynn quoted arguendo in *Norton* v. *Seton* (1).

The argument of counsel for the King's Proctor that the doctrines of contract should be imported is disposed of by the judgment of Lord Penzance in *Mordaunt* v. *Mordaunt* (2), approved in the subsequent report of the hearing in the House of Lords under the name of *Mordaunt* v. *Moncrieffe* (3).

There is neither precedent nor need for the doctrine of repudiation which the Irish courts have sought to import into the law of nullity.

The principles laid down in the Scotch cases are right; they accord with public policy and should be followed.

Cur. adv. vult.

July 26. LORD MERRIMAN P. stated the facts and having found that (1.) the commissioner was right in finding that respondent had not wilfully refused to consummate the marriage and (2.) the respondent had not repudiated the relationship of wife and the obligations of the marriage contract, continued:

Being entitled to draw any inference of fact which the court below should have drawn I think that the true inference is that in relation to his wife, at any rate, the husband always was, and still is, impotent and that the learned commissioner should have made an express finding to this effect instead of basing his judgment on the failure to discharge the onus of proof. It is only fair to the learned commissioner to say that I appreciate the difficulty which was created by the embarrassment of the alternative pleading and the husband's insistence on the allegation of wilful refusal. Moreover in drawing the positive inference upon a matter which the learned commissioner decided on the onus of proof I am not overruling any finding of fact based on his estimate of the credibility of witnesses whom he saw and heard.

---

(1) 3 Phill. 147.

(2) (1870) L. R. 2 P. & M. 109, 126.

(3) (1874) L. R. 2 Sc. & D. 374.

Having arrived at this conclusion there remains the difficult question of law whether an impotent spouse can, in any event, petition for nullity of marriage on the ground of his own incapacity to consummate the marriage; and secondly, it being expressly admitted, as I think rightly, that there was no evidence that the wife had repudiated the marriage, whether in the absence of such repudiation on her part the husband is entitled to a decree. We have already held that the husband is entitled to petition for nullity on the ground of his own impotence and that his right to do so is not conditional upon the repudiation of the marriage by the wife. Further, in view of the time that has elapsed since his petition was heard and dismissed, we decided to grant him a decree nisi at the conclusion of the hearing but to reserve the reasons for our decision because of the importance of the questions of law involved.

The real issue in this appeal having become apparent we were made aware that a petition, pending in the provinces and raising precisely the same point, had been referred to the King's Proctor for his assistance on these questions of law and that the case had been adjourned for the decision of this appeal. We, therefore, adjourned the appeal for a few days in order that we might hear counsel on behalf of the King's Proctor. We have had the advantage of hearing an admirable argument on both sides of the question and are greatly indebted to counsel for their assistance.

Unlike nullity on the ground of wilful refusal to consummate, which is a creature of the Matrimonial Causes Act, 1937, nullity on the ground of impotence does not depend upon any statute save in so far as s. 22 of the Matrimonial Causes Act, 1857, directs the court in all suits and proceedings other than those to dissolve any marriage to act and give relief on principles and rules which in the opinion of the court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts had theretofore acted and given relief.

The origin of the jurisdiction of the ecclesiastical courts in this respect is unquestionably to be found in the canon law, but it is essential to bear in mind the limitations on the effect to be given in this country to the canon law of Europe. On this point it is unnecessary to do more than refer to the well-known opinion of Tindal C.J. in tendering the advice of the judges to the House of Lords in *Reg.* v. *Millis* (1). " But that " the canon law of Europe does not, and never did, as a body " of laws, form part of the law of England, has been long " settled and established law. Lord Hale defines the extent to " which it is limited very accurately. ' The rule ' he says, " ' by which they proceed is the canon law, but not in its full " ' latitude, and only so far as it stands uncorrected either " ' by contrary Acts of Parliament or the common law and " ' custom of England ; for there are divers canons made in " ' ancient times, and decretals of the Popes, that never were " ' admitted here in England.' (Hale's Hist. of Comm. Law, " c. 2)." He quotes (2) Lord Coke as saying : " So, albeit the " Kings of England derived their ecclesiastical laws from " others, yet so many as were proved, approved and allowed " here by and with a general consent, are aptly and rightly " called ' The King's Ecclesiastical Laws of England '." It was sought, however, to deduce from the use of the word " proved " in this last passage that the onus of showing that any part of the canon law has been received and adopted in this country lies upon those who assert that it is so, and that if the matter is left in doubt it must be assumed that it has never been so adopted and received. I do not think that this is a question of the onus of proof at all. In *Proctor* v. *Proctor* (3) discussing the question whether a husband's suit based on the adultery of the wife was barred by his own subsequent adultery, Sir William Scott, as he then was, at p. 300 said : " If the " canon law is to be taken as the guide, there is certainly an " end of all question on the subject. If it be not, then the " question must rest upon modern decisions of our own (which " I am sorry to say, no diligence of myself or others have

(1) 10 Cl. & F. 534, 680.

(2) Ibid. 681.

(3) 2 Hag. Cons. 292.

C. A.
1948

HARTHAN
v.
HARTHAN.

Lord Merriman
P.

"been able to produce); and if they are wanting, recourse "must be had to the general principles of reason, morality, "and public convenience applicable to such a case."

In *Hope* v. *Hope* (1) a wife brought a suit for divorce against her husband by reason of his adultery; the husband recriminated the wife's adultery, and the suit was dismissed on the ground that both parties were proved guilty of adultery. The wife subsequently instituted a suit for restitution of conjugal rights, to which the husband pleaded in bar the previous suit and sentence. In his judgment Dr. Lushington (2), having found that by the canon law an adulterous wife was entitled to be received by her husband if he had also been guilty of a similar offence, concluded as follows: "I do not "find any instance in which the law so laid down has been "adopted and acted upon as part of the ecclesiastical law of "this land. I find a dictum of Sir William Wynne that, under "such circumstances, a suit for restitution would probably be "dismissed, and there is ground for inferring that such was "the opinion of Lord Stowell. The Court of Queen's Bench, "in two cases occurring after an interval of thirty-five years, "expressly declared that such was the law prevailing in the "ecclesiastical court. In my humble judgment, that rule is "sound in principle, and calculated to prove beneficial in its "operation. I have therefore come to the conclusion, that the "suit for restitution in this case cannot be sustained, and that "the husband must be dismissed." Bearing in mind that, although the common law courts prohibited any usurpation of jurisdiction by the ecclesiastical courts they have no right to correct error within the jurisdiction properly belonging to the ecclesiastical courts; *Rex* v. *St. Edmundsbury* (3), it seems to me that the true position is that in the absence of precedent it was the duty of the ecclesiastical courts to determine as a matter of principle whether a particular doctrine of canon law should be accepted as part of the ecclesiastical law of this country. When in 1857 jurisdiction in suits of nullity of marriage was transferred to the new court for Divorce and Matrimonial causes, s. 22 of the Matrimonial Causes Act, 1857, imposed upon that court in turn the duty and the right to form an opinion whether any principle upon which it was invited to act and give relief was as nearly as might be conformable to the principles on which the ecclesiastical courts had theretofore acted and given relief, a jurisdiction which is now by ss. 32 and 103 of the Judicature Act, 1925, vested in the High Court and the Court of Appeal. This is not the same thing as to say that the court cannot act or give relief unless an exact precedent is found for the particular relief sought.

---

(1) 1 Sw. & Tr. 94.

(2) Ibid. 108.

(3) [1948] 1 K. B. 195.

No records of the decisions of the ecclesiastical courts before the Reformation or indeed for many years afterwards are available but there appears to be no reason to doubt that the right of the impotent spouse to sue, whatever were its origin and limits, was accepted in this country. But it is also clear that the canon law recognized two notable exceptions: first, where the petitioner himself being aware of his own impotence had knowingly deceived the other spouse into contracting the marriage; and, secondly, where one entered into matrimony with a spouse whom he knew at the time to be impotent: in neither case could he afterwards be heard to set the marriage aside. These doctrines accord with the general principles that a man must come into court with clean hands; and that he cannot take advantage of his own wrong; or rely upon that as a grievance which he has voluntarily accepted with his eyes open.

In one form or another the argument that the right of the impotent spouse to sue is unknown in English law was based on the maxim that a man cannot be heard to take advantage of his own wrong. It will be necessary to examine the application of this doctrine more closely; but it seems to me at the outset to be necessary to bear in mind the distinct classes of case in which impotence may arise. On the one hand there is the class where impotence is due to some physical defect, which in turn may be plainly manifest to the impotent spouse as, for example, where there is a complete absence of genitalia, or may be quite unknown as for example a malformation of the vagina which is not necessarily apparent at all until after marriage. Between these extremes there will be a variety of gradations. On the other hand, there is the class of defect which to all outward appearance are purely psychological of which ejaculatio præcox on the part of the male, and vaginismus in the case of the female, are typical examples. In spite of the physical defects already referred to, it is plain that in this case the husband's disability is mainly psychological.

It is possible that psychological disabilities may be absolute rather than relative, and may be known to the party before the marriage; but, generally speaking, they are defects quoad

C. A.
1948
HARTHAN
v.
HARTHAN.
Lord Merriman
P.

hanc or quoad hunc, as the case may be, and were recognized as such by the canon law. Suffice it to say that such defects may often exist solely in relation to the particular marriage, or at least that it may, in the circumstances of any given case, be impossible to prove otherwise (see *C.* v. *C.* (1) per Lord Birkenhead L.C.), and that when this is so it is difficult to attribute the so-called fault or wrong to one spouse alone. It may be no more than a misfortune common to both. The same observation applies with added force to the case, of which an example is to be found in the authorities to which I must refer, where non-consummation is due to the physical fact that in relation to each other the male organ is too large and the female organ too small, although it is impossible to attribute to either spouse an absolute or general incapacity to perform the sexual act. In such circumstances, assuming the absence of deceit on the part of the petitioner, it is clearly necessary to be cautious in basing a conclusion on the supposed analogy with the doctrine forbidding a suitor to take advantage of his own wrong.

It being clear that the husband in contracting the marriage was wholly innocent of any deceit it is common ground that the consideration of the authorities may begin with the assumption that before the Reformation this marriage could have been annulled at his instance.

The leading case on the point is *Norton* v. *Seton orse Norton* (2) decided in the Court of Arches in 1819, the headnote of which reads : " A man not allowed to plead his own natural impotency " as a ground for sentence of nullity of marriage." It will be necessary to examine closely the reasons for this decision of Sir John Nicholl but for the moment I am concerned with report of the argument of counsel. Doctor Adams and Doctor Dodson in objection to the libel argued that this was a novel suit which could not be entertained ; they stated that they found no express law that a man might or might not complain on this ground, but this was probably because no one could contemplate such a case. They called attention to the doctrine of the canon law that a person was not entitled to a divorce who knowingly contracted marriage with an impotent person and argued a fortiori that a person knowing of his own impotency could not make it the foundation for a suit for nullity of marriage. Doctor Phillimore and Doctor Lushington on the other hand argued that no doctrine of the canon law was clearer than that

(1) [1921] P. 399, 401, 402.

(2) 3 Phill. 147.

a man might sue for a nullity of marriage by reason of his own impotence. After citations from the commentaries, to some of which it will be necessary to refer, they admitted the doctrine that a man was not entitled to a divorce who knowingly contracted marriage with an impotent person, but argued that the very same books laid down that he might allege his own impotency as a ground of divorce.

Sir John Nicholl thereupon adjourned the hearing in order to examine the authorities to see what was the doctrine of the canon law, and how far it had been adopted in this country, and ordered a search to be made whether there had been any precedent for such a suit, adding " If the defect was such as " had been pleaded it seems as if the marriage must have been " contracted scienter." He also stressed the length of the cohabitation before the party came to annul his own contract.

At the resumed hearing Dr. Phillimore (1) pointed out the difficulties attending the search from the want of reported cases and the inaccurate manner in which the Arches books had been kept. It was stated (2) that the result of the search was that there were many instances of suits having been brought many years longer after the marriage than in the present instance, but none in which the party seeking redress had been the party labouring under the infirmity, but counsel asserted that there had been undoubtedly many suits of which no traces could then be found.

On the basis that no precedent for such a suit in the ecclesiastical courts had been discovered Mr. Simon (on behalf of the King's Proctor) argued that the right of an impotent spouse to sue had never been accepted in this country after the Reformation, or that, if it ever had been accepted, it must have lapsed by desuetude over two hundred years ago, since the earliest set of ecclesiastical reports, those of the judgments of Sir George Lee by Dr. Phillimore, carry the position back about seventy years before Dr. Phillimore's own reports. He developed this argument on two distinct lines of reasoning.

The first argument was based on the nature of the canon law itself. By the canon law marriage was held to be one of the sacraments, but this doctrine was formally repudiated by art. 25 of the Articles of Religion set out in the Book of Common Prayer. Moreover by the canon law a marriage between impotent spouses was absolutely void; for the canon law recognized no distinction between void and voidable marriages

(1) 3 Phill. 147, 151.

(2) Ibid. 156, 157.

hanc or quoad hunc, as the case may be, and were recognized as such by the canon law. Suffice it to say that such defects may often exist solely in relation to the particular marriage, or at least that it may, in the circumstances of any given case, be impossible to prove otherwise (see *C.* v. *C.* (1) per Lord Birkenhead L.C.), and that when this is so it is difficult to attribute the so-called fault or wrong to one spouse alone. It may be no more than a misfortune common to both. The same observation applies with added force to the case, of which an example is to be found in the authorities to which I must refer, where non-consummation is due to the physical fact that in relation to each other the male organ is too large and the female organ too small, although it is impossible to attribute to either spouse an absolute or general incapacity to perform the sexual act. In such circumstances, assuming the absence of deceit on the part of the petitioner, it is clearly necessary to be cautious in basing a conclusion on the supposed analogy with the doctrine forbidding a suitor to take advantage of his own wrong.

It being clear that the husband in contracting the marriage was wholly innocent of any deceit it is common ground that the consideration of the authorities may begin with the assumption that before the Reformation this marriage could have been annulled at his instance.

The leading case on the point is *Norton* v. *Seton orse Norton* (2) decided in the Court of Arches in 1819, the headnote of which reads : " A man not allowed to plead his own natural impotency " as a ground for sentence of nullity of marriage." It will be necessary to examine closely the reasons for this decision of Sir John Nicholl but for the moment I am concerned with report of the argument of counsel. Doctor Adams and Doctor Dodson in objection to the libel argued that this was a novel suit which could not be entertained ; they stated that they found no express law that a man might or might not complain on this ground, but this was probably because no one could contemplate such a case. They called attention to the doctrine of the canon law that a person was not entitled to a divorce who knowingly contracted marriage with an impotent person and argued a fortiori that a person knowing of his own impotency could not make it the foundation for a suit for nullity of marriage. Doctor Phillimore and Doctor Lushington on the other hand argued that no doctrine of the canon law was clearer than that

(1) [1921] P. 399, 401, 402. (2) 3 Phill. 147.

in *Mordaunt* v. *Mordaunt* (1). I will quote but one sentence (2). He sums the matter up by saying " When the analogy of legal " remedies in other cases of contract is put forward for " adoption the answer is that the analogy does not exist." The fact that the decision of the Full Court, of whom Lord Penzance was one, was overruled by the House of Lords in *Mordaunt* v. *Moncrieff* (3) does not detract from this part of Lord Penzance's judgment. On the contrary the report shows that in advising the Lords both Brett J. (4) and Kelly C.B. (5) were in complete agreement with Lord Penzance in this respect. The same point is made by Sir Francis Jeune P. in *Moss* v. *Moss* (6), where he says: " While habitually " speaking of marriage as a contract English lawyers have " never been misled by an imperfect analogy into regarding it as " a mere contract or into investing it with all the qualities and " conditions of ordinary civil contracts."

This brings me to an examination of the authorities. In the Introduction to Ayliffe's Parergon (1727) the learned author expressly says that one of the designs of the work is to illustrate the force and practice of the canon law as far as it has been received and is now observed amongst Englishmen. In the body of the work at the end of this section headed " Of divorce, " and the several causes thereof " occurs this passage: "The " husband may pray a separation of matrimony on the account " of the matrimonial impediment, though such impediment " proceeds and arises from himself; as from his own impotency " and frigidity; but if he knowingly marries a woman that " cannot render him his due, he is (notwithstanding) bound to " maintain her and shall not be divorced from her; for he " ought to impute it to himself."

The next is Oughton's Ordo Judiciorum (1738) Tit. CXCIII. De Causis Matrimonialibus. In section XVIII, after referring to impotence, frigidity, malformation and the like as rendering a marriage null, the author says that these natural impediments may sometimes occur as well in the wife as in the husband. To this passage there is a footnote adding that the quotation from the ancient manuscript " Et pars gravata agere potest, " in causa nullitatis matrimonii." This may mean that the party aggrieved may sue, but may also be translated " the

---

(1) L. R. 2 P. & M. 109, 126, 129.
(2) Ibid. 129.
(3) L. R. 2 Sc. & D. 374.
(4) Ibid. 377.
(5) Ibid. 380.
(6) [1897] P. 263. 267.

"party afflicted may sue." Perhaps the former is the more natural construction but as it is impossible to resolve the doubt it must be left there.

Next in order is an opinion of Sir William Wynn dated 1777 quoted in *Norton* v. *Seton* (1), "I think a woman may institute "a suit of nullity of marriage against her husband on account "of impotency or incapacity in herself to perform the duties of "marriage; and I think that if the persons appointed by the "court to inspect her (which is the method of proof upon which "these cases always proceed) should certify that she appeared "to them, from a defect in the natural formation of her body, "to be absolutely incapable of being carnally known by a man; "upon this proof the marriage must be pronounced null and "void."

That brings me again to the case of *Norton* v. *Seton* (2). As appears from Sir John Nicholl's judgment the libel pleaded that the "marriage took place in June, 1812, that the husband "was a bachelor aged forty-five years and the wife a spinster "aged twenty-three: that they cohabited till June, 1819; "that they were both in health, but that the husband was "incapable, from bodily defect to consummate the marriage; "that his defect was incurable by art, as would appear upon "inspection by medical persons."

In the judgment Sir John Nicholl said (3): "The first "objection is, that the suit is of a novel kind. After the best "and most diligent search no instance has been found of a "party bringing a suit to set aside a marriage on account of "his own incapacity; the party complaining has always been "the injured party, and generally the suit has been brought by "the wife; there has been but one suit in my recollection "brought by the husband, *Wilson* v. *Wilson* (Arches 1795). "The next circumstance is the age of the man. It is incredible "that he should have lived forty-five years, and be ignorant "of his own bodily defect, which he alleges to be apparent upon "inspection. I do not see how his ignorance could be proved; "it is incapable of direct evidence. The presumption is in "favour of the marriage; besides there was a subsequent "cohabitation of seven years before the suit was brought; "at all events he must have discovered it some time before he "applied for his remedy." Later (4), Sir John Nicholl says: "Ignorance of the fact is not only not to be presumed, but is

---

(1) 3 Phill. 147, 149, note (*b*).
(2) Ibid. 147.
(3) Ibid. 159.
(4) Ibid. 160.

C. A.

1948

HARTHAN
v.
HARTHAN.

Lord Merriman
P.

"almost incredible." He says (1), that the sole authority in support of the suit is the text quoted from the canon law and that it was necessary to examine how far that law applied to the case and how far it had been received in this country. He refers to the Decretal of Pope Gregory IX, Lib. IV, Tit. XV, c. 1, which is given in the margin of the Parergon as the authority for the passage already quoted.

Sir John Nicholl, on the next page, says (2): "But let us "examine how the text and commentators apply to the "present case. The text applies to frigidity which may be "unknown before trial; but here the bodily defect is stated to "be apparent." Lower down on the same page he says: "If the marriage was contracted scienter; the party knew of "the defect, and he could not be heard. The assertion of the "defect in himself raises the presumption that he contracted "the marriage scienter, that he cohabited scienter, and "defrauded the woman. If the canon law is to govern the "case, the text referred to does not come up to the point; "even if it did, something more would have to be shown, "namely, that it has been received as the law in this country; "it might not be necessary for this purpose to show a case "precisely similar; it would be sufficient to show that it is "according to the general rules observed here. But it is a "strong, and almost a conclusive, presumption against the "present proceeding that no suit appears ever to have been "brought by any but the injured party."

On the next page (3), he deals with Sir William Wynne's opinion by saying: "Another authority has been cited from "the opinion of counsel; but that was on the case of a woman. "The opinion of any person of higher authority cannot be "produced than of that person: but it cannot be considered "as an authority applying to this case. The court does not "mean to lay it down that in no possible case, or under no "circumstances, a woman may not be allowed to bring such "a suit." He continues: "But even if the canon law is "direct on the point, is it according to the law of England to "receive such a suit? It is a maxim that no man shall take "advantage of his own wrong; it is the principle of the canon "law itself, the principle of reason and justice."

I have refrained from quoting passages from the judgment relating to the length of the cohabitation and the enjoyment of

---

(1) 3 Phill. 147, 161.

(2) Ibid. 162.

(3) Ibid. 163.

C. A.
1948

HARTHAN
v.
HARTHAN.

Lord Merriman
P.

the wife's property and the impossibility of drawing corroboration from inspection of the wife owing to her pregnancy which also weighed with Sir John Nicholl; but it is evident that his judgment is founded in the main on his belief that the husband entered into the marriage well knowing his physical defects and so deceived the wife into marrying him. This indeed offended the principle that no man shall take advantage of his own wrong, and that this was a principle of the canon law itself appears from Sanchez Disputatio CXIV (1626 ed., p. 404).

It is not surprising therefore that no precedent for a suit of that kind had been found, but that does not dispose of the general point. In view, however, of the passage in the Introduction to the Parergon, to which reference has already been made, I am unable to accept Sir John Nicholl's dismissal of the Parergon on the ground that the learned author merely referred to the text of the canon law. It is true that that is the sole authority cited, but the book professes to be a commentary on the canon law of England. Sir John Nicholl's qualified acceptance of Sir William Wynne's opinion that a woman may institute a suit of nullity of marriage against her husband on account of impotency or incapacity in herself to perform the duties of marriage seems to me to show that Sir John Nicholl cannot have meant that an impotent spouse could in no circumstances put forward his own incapacity; indeed he expressly stated (1) that he did not mean to lay it down that in no possible case or under no circumstances a woman might not be allowed to bring such a suit. By this I think he must have meant to draw the distinction which appears earlier in this judgment between the case of a man and a woman in respect of physical defects, that is to say, defects which in the nature of things would be apparent in the case of the man before marriage but not necessarily in the case of the woman. However this may be it is sufficient to say that *Norton* v. *Seton* (2) does not purport to deal with a case such as the present where the disability is of a kind which as Sir John Nicholl recognized (3), is not necessarily apparent before marriage and of which the petitioner was wholly ignorant. The decision itself can clearly be supported on the ground of deceit.

Poynter in his Doctrine and Practice of the Ecclesiastical Courts (1824 ed., p. 131) says: "Until a recent case it is said "that there was no instance on record of a party having brought

---

(1) 3 Phill. 147, 163.
(2) Ibid. 147.
(3) Ibid. 162.

C. A.
1948
HARTHAN
v.
HARTHAN.
Lord Merriman
P.

"a sentence of nullity by reason of his or her own infirmity." The learned author quotes the passage from the Parergon already referred to and adds: "In such a case the party "proceeding is more particularly bound to a strict proof of all "necessary facts." He then deals with the instance alluded to, which was the case of *Norton* v. *Seton* (1) showing that he regards the case as having been decided both on the absence of the corroboration by inspection of the wife and on the ground of scienter. It is clear, however, that he does not regard that decision as overriding the general proposition accepted in the Parergon.

In *Miles* v. *Chilton* (2) Doctor Lushington, who had appeared for the husband in *Norton* v. *Seton* (1), distinguished it from the case, with which he was dealing, of a marriage absolutely void as being bigamous. He clearly regarded *Norton* v. *Seton* (1) as being founded on the fact that the husband knew of his own defects at the time of the marriage (3), but even in this respect he did not hesitate to say (4) that he thought there were grounds which should have induced Sir John Nicholl to admit the libel.

Again, in *B.—N.* v. *B.—N.* (5) Sir John Dodson in the Arches Court said: "I do not consider it necessary to travel "through the case of *Norton* v. *Seton* (1). It is sufficient to "say that it was a suit in which the husband, the party com"plaining, alleged his own impotency, though by the canon "law that circumstance may not be an obstacle to the suit; "still if the marriage be contracted scienter, as Sir John "Nicholl in *Norton* v. *Seton* (1) considered to be the case, the "party will not be permitted to take advantage of his own "fraud." This judgment was affirmed by the Privy Council (6) but without reference to this particular passage. The real point in that case was whether the right of the potent spouse was barred by delay.

In s. 792 of Dr. Bishop's New Commentaries on Marriage, Divorce and Separation, 2nd ed., 1891, vol. I., p. 341, the learned author deals with the question of the grievance as follows: "*Whether impotent party sue:* One who, being in fact impotent "yet ignorant of his condition, enters into a marriage, especially

---

(1) 3 Phill. 147.
(2) 1 Rob Ecc. 684.
(3) Ibid. 684, 697.
(4) Ibid. 699.
(5) 1 Spinks, Ecc. & Adm. 248, 254.
(6) Ibid. 257.

"with a competent person, is injured, and not the less so "because of the greater injury which he inflicts on the other. "Therefore in just principle he, as well as the other, is entitled "to the suit for nullity. For only through actual choice and "knowledge should any person be held in this painfully "embarrassing relation, as uncongenial to the impotent spouse "as to the other. But whether or not under any circumstances "the law, as viewed from the standpoint of authority, will "sustain a suit by the impotent party is a question upon which "opinions are conflicting; as it will not often arise in practice, "it is deemed sufficient simply to cite the authorities. It is "pertinent to ask how, if this sort of suit is not maintainable, "the marriage in a case of equal 'impotence versus hanc' "is to be dissolved." I find it difficult to answer this very pertinent question except upon the footing that in the absence of actual choice or knowledge it is open to either spouse to sue.

This brings me to an examination of the modern cases. In *A.* v. *A. sued as B.* (1), the impotent spouse was granted a decree after a demurrer to the petition had been overruled both by Warren J. and by the Irish Court of Appeal. It is plain that the judgments in the Court of Appeal on the demurrer are based on the finding that the wife had repudiated the marriage. I will return to this point later.

That case was followed in *G.* v. *G. orse K.* (2). There the marriage had been celebrated in accordance with the rites of the Armenian Church but was not in conformity with the form prescribed by the Registration Act, 1836. Five years after the marriage the wife returned to her parents and refused to resume cohabitation and thereupon the husband brought a suit of restitution to which the wife alleged in her answer that the marriage was invalid owing to the omission of the requisite forms, the husband in reply pleading that the omission was not wilful within the meaning of the Act. The wife then presented a cross-petition for nullity on the alternative grounds that there was no valid marriage as to form and that the marriage had not been consummated owing to the incapacity of the husband. The husband denied the non-consummation. The President (Lord Gorell) decided to try the nullity suit first and found that there had been no consummation of the marriage but expressly guarded himself from suggesting a general condition of incompetence against the husband, the condition existing only relatively to the wife. It was a case in which the relative sizes

(1) 19 L. R. Ir. 403.

(2) 25 T. L. R. 328.

C. A.

1948

HARTHAN
v.
HARTHAN.

Lord Merriman P.

of the parts had prevented consummation and the wife had declined to undergo an operation which might have been successful. Unfortunately there is only a brief report of the judgment in the Court of Appeal and, in spite of the fact that the Master of the Rolls said that the appeal was of some importance as being without precedent in the English courts, the case is not reported elsewhere. Lord Cozens-Hardy M.R. said that the President had acted wisely and within his powers in trying the issue of fact before the issue of law. On the point as to jurisdiction he desired to adopt the principle of the Irish courts laid down in *A.* v. *A. sued as B.* (1), in which a strong court had decided that a decree of nullity might be granted at the suit of an impotent person. He added, however, that this was a discretion which the court should exercise very carefully. In upholding the President's finding of impotency the Master of the Rolls said that this implied no reflection on either party as each could no doubt contract marriage with another person; it was true that an operation might make the wife "apta" to this man but the court could not require it to be done. He added that he did not think it right that these persons should be compelled to live together under those circumstances. He thought that the order of the President should be affirmed, but in a modified form so as to avoid any reflection on the general capacity of the husband. Fletcher Moulton and Farwell L.JJ. agreed, Farwell L.J. adding that he did not think the wife guilty of a wrong because she declined to submit to an operation.

It was argued that by adopting the principle laid down in *A.* v. *A. sued as B.* (1) the Court of Appeal must be taken to have decided that a petition by an impotent spouse is only admissible if the respondent has repudiated the marriage. In my opinion the Court of Appeal decided nothing of the kind. The case was one of physical incapacity relative and mutual; it was the wife who was the petitioner for nullity and she had refused to submit to an operation which would probably have been successful, although this was held not to debar her from petitioning. The husband, on the contrary, so far from repudiating the marriage was asserting his own capacity which, except quoad hanc, was found in his favour, and was actually suing for restitution of conjugal rights. That being so, the decision to grant the wife, who was herself impotent quoad hunc, a decree based upon the corresponding impotence of the husband had no connexion whatever with any repudiation of the marriage by the respondent husband. On the contrary it seems to me to be an excellent example of the dilemma posed by Dr. Bishop in the passage already quoted from his work. The fact that a physical rather than psychological disability was involved is irrelevant, since the mutual disability was merely in relation to the other spouse and not general, nor was it suggested that either spouse was aware of it at the time of the celebration.

---

(1) 19 L. R. Ir. 403.

In *S. G.* v. *W. G.* (1) in answer to the wife's action for declarator that there had been a lawful marriage per verba de præsenti at Gretna Green the husband not only denied that a contract of marriage had been entered into but averred that at the date of the alleged marriage he was and still remained impotent and that any ceremony of marriage entered into by the parties was, on that account, null and void. The averment of impotency was held to be irrelevant as a defence in respect that, by the law of Scotland, a marriage was not void but only voidable on the ground of impotency; but the court expressly reserved the question whether an action of nullity of marriage on the ground of impotency is competent at the instance of the impotent spouse. On this issue there are some very useful passages in the judgments, but I do not think it necessary to quote them in view of the decision of the question by the Court of Session in the case of *F.* v. *F.* (2) to which I will refer later. It is, however, important to notice that the ground of the decision itself was that in Scots law, as in English law, a marriage is not void but only voidable on the ground of impotency.

In *G.* v. *G.* (3) each spouse alleged that the admitted non-consummation arose through the incapacity or physical defect of the other. According to the report of the medical inspectors the husband was anatomically well formed and normal in every respect and was apparently capable of performing the act of generation. The wife was found to be virgo intacta and there was no impediment on her part to prevent consummation of the marriage. Bargrave Deane J. said that it was manifest that the marriage had not been consummated and could not be consummated, but was not prepared to say whether it was the fault of the man or the woman. He added: "I see no reason "to hold that either one or the other has been guilty of perjury.

(1) 1933 S. C. 728.
(2) 1945 S. C. 202.
(3) [1912] P. 173.

"Their stories are absolutely inconsistent; but that is "immaterial, if I am satisfied that quoad hanc et quoad hunc, "these people cannot consummate the marriage. If for some "reason which is not quite clear, but in fact, the court is "satisfied that the marriage cannot be consummated, then the "court if entitled to annul the marriage and not tie the two "people together for the rest of their lives in a state of misery. "Therefore I am prepared to pronounce a decree in this case, "not on the petition of either of them, but on the petition of "both of them, leaving either of them to apply to make the "decree absolute, both, if possible." Apart from the distinction that the disability was psychological and that each spouse was petitioning and was granted a decree, the principle of the decision is essentially the same as that of the Court of Appeal in *G.* v. *G. orse K.* (1), since the learned judge was prepared to grant a decree to each spouse, as the petitioner, although he or she may have been impotent quoad the other, and although he was not able definitely to find impotence proved against either spouse as the respondent to the other's suit. In my opinion the case cannot be discounted merely as an instance of each petitioner succeeding on the ground of the impotence of the other. It was followed by Swift J. in *H.* v. *H.* (2), where the wife was allowed to amend her answer to the husband's petition for nullity by adding a cross-prayer for nullity.

In *Davies orse Mason* v. *Davies* (3) Langton J. based his decision in favour of the impotent wife in respect of that which he described as a "misfortune" on the repudiation of the marriage by the husband whilst expressly reserving the question whether apart from the repudiation the wife could have sued.

In *McM.* v. *McM.* (4) the husband petitioned for nullity on the grounds of his own impotence and of the repudiation of the contract by the respondent. Hanna J. having made a full and useful review of the canon law and of the authorities, held that the wife had not repudiated the contract and that, consequently, the petitioner could not rely on his own impotence and accordingly decided that the petition must be dismissed.

I do not find it easy to understand the principle first introduced by the Irish cases that the repudiation of the marriage by the respondent gives the impotent spouse a remedy to which he or she is not otherwise entitled. The hypothesis is that by

---

(1) 25 T. L. R. 328.
(2) (1929) 98 L. J. (P.) 155.
(3) [1935] P. 58.
(4) [1936] I. R. 177.

C. A.
1948
HARTHAN
v.
HARTHAN.
Lord Merriman P.

reason of the petitioner's wrong or default, defect or misfortune, as it has variously been described, he or she is not entitled to sue, but that if there is added the circumstance that, for this very reason, the respondent has repudiated the marriage there is a cause of action. This question is dealt with very fully by Hanna J. in *McM.* v. *McM.* (1) in two passages. In the first passage (2), after referring to the passage in Lord Selborne's judgment in *G.* v. *M.* (3) dealing with estoppel by approbation of the marriage, he says: "It is quite logical that there may "be conduct on the part of the person opposing the petition, "which would estop that person from denying 'the just cause' "and support the ground of the petition by creating a further "moral equity in the petitioner's support. In other words, "a petitioner, while relying upon his own impotence as a "ground for showing that there is no verum matrimonium, "may show conduct on the part of a respondent which estops "or precludes him or her from justly controverting the primary "allegation that there is no verum matrimonium. This "seems to be the underlying principle." Then (4), Hanna J. says: "to sum up finally on this difficult question of law, and "having considered the argument advanced in its three "branches, I have formed a definite opinion that the decree for "nullity of marriage cannot, according to the principles of the "ecclesiastical law as administered in our matrimonial courts, "be granted to a petitioner on the ground merely of a "petitioner's own impotence, but it is clearly established that "if a petitioner can, in addition to proof of his own impotency, "satisfy the court that there had been, and is, conduct on the "part of the respondent which has destroyed the verum "matrimonium, e.g., by a genuine and deliberate repudiation "of the marriage contract, and its obligations, the court may "ex justa causa grant the relief." To base the principle on estoppel of the respondent clearly leads to difficulties if the argument that the petitioner cannot sue because he is estopped from denying his own implied representation of capacity is accepted, for this would lead to the position that each party in turn was estopped from suing. Moreover, I do not find it easy to deduce from the cases in which repudiation by the respondent has been relied upon any principle by which to determine whether there has been such a repudiation as to entitle the impotent spouse to sue.

(1) [1936] I. R. 177.
(2) Ibid. 205.
(3) 10 App. Cas. 171, 186.
(4) [1936] I. R. 177, 219.

In *McM.* v. *McM.* (1) the finding that the wife had not repudiated the marriage, although she had refused to return to her husband partly on account of his violence and partly on account of what is described as his neurasthenic condition over sexual matters, is based on the finding (2) that she would not in any way repudiate the marriage contract (which to her was a sacrament) save under a decree of her own church though she herself had refrained from instituting any such proceedings. The decision, therefore, appears to turn on the wife's motive for her action rather than on the action itself. On the other hand, in *A.* v. *A. orse B.* (3) the repudiation by the wife, whose motives may have been equally good, was based on her having instituted proceedings in the church courts though she had declined to proceed in the High Court. Likewise in *B.* v. *M.* (4) the respondent wife had repudiated the marriage by leaving Australia and by going to the United States of America, where she obtained a decree of nullity. In *B.* v. *B.* (5), an impotent wife who had refused to submit to an operation, which would probably have cured the defect, obtained a decree about eight months after the marriage ceremony on the grounds that the husband had repudiated the marriage because in consequence of her incapacity he had struck her in the face and deserted her some six weeks after the marriage. In *Davies orse Mason* v. *Davies* (6) the husband's repudiation was based upon the allegation that he had not provided a home for the wife or contributed anything to her support; had had no concern for her welfare when ill and had said that he had lost all desire for intercourse after efforts to consummate the marriage during the first year had failed and that he had said that he had no intention of living with the wife and she could go her own way.

Manifestly the strongest support for the inference of repudiation is afforded by the institution of proceedings to annul the marriage by the potent spouse. Yet in such a case the petitioner is merely seeking the relief to which he or she is justly entitled for a grievance which the impotent spouse is assumed not to have suffered. How, then, can this give the impotent spouse the right to sue? In my opinion the sounder view is that the reaction of the respondent to the situation created by the impotence of the petitioner should be taken into

---

(1) [1936] I. R. 177.
(2) Ibid. 199.
(3) 19 L. R. Ir. 403.
(4) (1942) Q. W. N. 5.
(5) (1942) Q. W. N. 23.
(6) [1935] P. 38.

C. A.

1948

HARTHAN
v.
HARTHAN.

Lord Merriman
P.

account in considering whether the circumstances of the case as a whole, including the respondent's attitude, are such as to debar the impotent spouse from suing. It is manifestly impossible to speak otherwise than in general terms, for the circumstances will vary infinitely. The real antithesis, it seems to me, is between saying on the one hand that the impotent spouse has no cause of action unless the other spouse has repudiated the marriage, whatever that phrase may mean, and on the other hand allowing the impotent spouse the right to sue unless in the circumstances of the case it is unjust that he or she should do so.

In any given case the court will naturally bear in mind Lord Selborne's admonition in *Cuno* v. *Cuno* (1) that it would be a great error on the part of judges to suffer their feelings of compassion to prevail over the principles which ought to govern them in dealing with this class of case, and that to open the door to lax and easy declarations of nullity would be a grave public mischief.

That brings me to the latest authority on this difficult question, the decision of the Court of Session in *F.* v. *F.* (2). This was a husband's action for declarator that the marriage was null and void by reason of his own impotency. There was no appearance for the wife. The husband averred that he had resided with the wife from the date of the ceremony in August, 1943 until April, 1944, when he left her; that during this period he had attempted to have sexual relations with her but had found he was unable to do so and that he was incapable by reason of physical deformity of having sexual relations and and been so incapable at the time of the pretended marriage. The Lord Ordinary, Lord Mackintosh, on a motion by the husband for a proof of his averments reviewed the authorities, expressed a doubt whether any reliable assistance was to be got from the decision of the Court of Appeal in *G.* v. *G. orse K.* (3) and indicated that except for the case of *S. G.* v. *W. G.* (4) he would have dismissed the action as incompetent; but that as the question of competency now arising was in that case expressly left open he thought it proper not to deal with the motion before a proof but to report the case to the Inner House. Thus the question was dealt with by the Inner House as a pure question of law; they decided to instruct the Lord Ordinary that the instance was good and that the action should be allowed to proceed. In spite of the husband's averment that his incapacity was due to physical deformity the case appears to have been argued upon the footing that the husband was not aware of his impotence until after the marriage ceremony.

---

(1) L. R. 2 Sc. & D. 300, 301.

(2) 1945, S. C. 202.

(3) 25 T. L. R. 328.

(4) 1933 S. C. 728.

Before dealing with Lord Normand's judgment I wish to refer to a passage in Lord Moncrieff's judgment (1) where he says: "The decision of the Court of Appeal in England in the "case of *G.* v. *G. orse K.* (2) is directly in point and is un-"ambiguous. I remain of the opinion which I expressed in "my report in *L.* v. *L.* (3) that the consistorial law of Scotland "should not consult English decisions. In cases in which the "question to be determined is, however, a broad humanitarian "question which is independent of proper consistorial law, "I think that our courts are entitled, and may do well, to "accept guidance from what has been decided by learned "judges in England." Conversely it was argued by Mr. Simon that no attention should be paid to this decision because of the greater authority of the canon law in Scotland. It is indisputable that there are divergences between the laws of the two countries in relation to divorce. The case of desertion is the clearest example, and others are to be found in connexion with condonation, collusion and connivance. But counsel was unable to point to any essential difference in the law of the two countries as regards nullity and, as has already been seen, it is well settled in both countries that impotence merely renders a marriage voidable and not void.

Seeing that the Court of Appeal assumed in the case of *de Reneville* v. *de Reneville* (4) that the residence of both parties as distinct from domicile might be sufficient to found jurisdiction in the case of nullity, it would obviously be in the highest degree inconvenient if the law of the two countries were to differ on the question now under discussion unless that is inevitable. This brings me finally to the judgment of Lord Normand. I need not quote from his review of the authorities, to many of which I have already referred. His conclusion is expressed in the following passage (5): "In principle any person "who has a title and interest in the subject matter of an action "is a competent pursuer, and it is a general rule of our law that

---

(1) 1945 S. C. 202, 210.
(2) 25 T. L. R. 328.
(3) 1931 S. C. 427.
(4) [1948] P. 100.
(5) 1945 S. C. 202, 208.

"title rests upon interest. There are exceptions to this "general rule, but I know of none which bears relevantly on "the present question. Taking the general rule as a useful "test, it can hardly be questioned that the impotent spouse "has an equal interest with the potent spouse in a question "which vitally affects his or her status. The bond of a marriage "which cannot be consummated, it may be added, can be as "irksome and humiliating to the impotent as to the other "spouse. If, therefore, the impotent spouse is to be denied "the remedy, it is necessary to enquire what is the supposed "ground for this denial. Lord Fraser speaks of the potent "spouse as the party aggrieved. But, with respect, both alike "are aggrieved; and to treat the potent spouse as alone "aggrieved is to imply that the impotent spouse is in some "sense a defaulter, as though he or she had failed to implement "a contract and was debarred from founding on his or her "default . . . . Where the incapacity results from a physical "or temperamental condition, for which the sufferer is not "responsible, he cannot be debarred from the remedy on the "ground that he has defaulted in his obligations. There may, "of course, be circumstances which will bar the potent (sic) "spouse. If, for example, he or she entered into marriage "knowing the defect, the other spouse would indeed be entitled "to complain, and to plead the suppressio veri in bar of the "action. But the report in the present case does not mention "any facts suggestive of a plea of personal bar, and it is not "necessary to consider further what circumstances would "properly give rise to it. The only other ground for refusing the "remedy to the impotent spouse that has been put forward is "that it is contrary to public policy that the remedy should be "open to anyone but the potent spouse. But I cannot see any "reason for thinking that the public interest is injured by "allowing the impotent spouse an equal right to sue, and on "this I agree entirely with the opinion of Lord Murray." The reference is to *S. G.* v. *W. G.* (1).

I find myself in complete agreement with this conclusion which exactly expresses my own view of the matter. In my opinion there is no reason in principle or on authority why the same should not be declared to be the law of England.

BUCKNILL L.J. I agree. The appeal should be allowed for the reasons which are set out so clearly in the judgment of the learned President. I have nothing to add.

---

(1) 1933 S. C. 728, 735.

HODSON J. I also agree.

Appeal allowed.

Solicitors for the appellant: *Kenneth, Brown, Baker, Baker.*

Solicitor for the King's Proctor: *Treasury Solicitor.*

DANCER *v.* DANCER (HARE INTERVENING; MARSDEN CITED).

1948
June 28, 29, 30;
July 1.

Ormerod J.

Divorce—Nullity—Marriage—Publication of banns—Concealment—The "true name"—Marriage Act, 1823 (4 *Geo.* 4, *c.* 76) *ss.* 7, 22.

A marriage will not be set aside on the ground of no due publication of the banns for the purposes of s. 22 of the Marriage Act, 1823, where there is no element of fraud or concealment.

The name of baptism and native surname may be overridden by the use of other names assumed and generally accredited, which become the true names of a party to a marriage within the meaning of s. 7 of that Act.

Defended matrimonial cause, wherein a prayer for nullity of marriage was considered before the other matters raised by the pleadings and wherein a judgment was given on the issue raised by that prayer before those other matters were dealt with by the court.

By her petition, Jessamine Dancer prayed for dissolution of her marriage with George Alexander Dancer on the grounds of his alleged cruelty and adultery. The petitioner was referred to in the petition as having been "Jessamine Roberts, spinster," at the time of the marriage. By his answer, the respondent denied the cruelty and adultery alleged and admitted that "a ceremony of marriage was celebrated between the petitioner "and the respondent as alleged in para. 1 of the petition" (wherein the formalities as to the marriage ceremony were recorded) but denied that "the said ceremony constituted a "valid marriage by reason of the fact that the banns of "marriage to the knowledge of the petitioner and the "respondent were published in a false name that is to say the "name of the petitioner was not Jessamine Roberts but

1948

DANCER
v.
DANCER
(HARE
INTER-
VENING ;
MARSDEN
CITED).

"Jessamine Knight" and claimed a decree of nullity in consequence. In the alternative the respondent husband alleged adultery on the part of the wife, and prayed for a decree of divorce.

The relevant facts were as follows: The wife petitioner was born in 1904 and was the legitimate daughter of a Mr. and Mrs. Knight. She was christened Jessamine and was registered in the name of Jessamine Knight. Her parents became estranged, and when she was about three years of age her mother began to live with a man whose name was Roberts, lived with him as his wife until his death in 1921, and by him had five children.

The petitioner was brought up as the child of Roberts and was always known by the name of Roberts. She was not told until Roberts' death that Roberts was not in fact her father, as she had always believed, and that her real surname was not Roberts but Knight. She was married to the respondent in 1924. Before her marriage she told him that her real name was Jessamine Knight. She and the respondent thereupon together interviewed the vicar on the matter, laid all the facts before him, and asked his advice; and the vicar advised her to have the banns called in the name of Roberts to avoid misleading the public, who might not recognize who was to be married if the banns were called in the name of Knight (1).

T. Simpson Pedler for the wife petitioner.
D. Armstead Fairweather for the respondent husband.
Kennedy Kisch for the party cited.

ORMEROD J. The question which I have to decide is whether there has been any breach of the provisions of s. 22 of the

(1) Marriage Act, 1823, s. 7: "Provided always . . . . that no "parson, vicar, minister, or curate "shall be obliged to publish the "banns of matrimony between any "persons whatsoever, unless the "persons to be married shall, "seven days before the time "required for the first publication "of such banns respectively, "deliver or cause to be delivered "to such parson, vicar, minister, "or curate, a notice in writing "dated on the day on which the "same shall be so delivered, of "their true Christian names and "surnames, and of the house or "houses of their respective abodes "within such parish or chapelry "as aforesaid, and of the time "during which they have dwelt, "inhabited or lodged in such "house or houses respectively."

Section 22: "Provided always, ". . . . that if any persons shall "knowingly and wilfully inter- "marry in any other place than a "church, or such public chapel

1948

DANCER
v.
DANCER
(HARE
INTERVENING;
MARSDEN
CITED).

Ormerod J.

Marriage Act, 1823, on the grounds that the banns had not been duly called. That section is quite clear in its terms, in that it provides that a marriage shall be null and void to all intents and purposes whatsoever, if the parties shall knowingly and wilfully intermarry without due publication of banns. By s. 7 of the same Act it is provided that before the banns shall be published the parties shall cause to be delivered their true Christian names and surnames, and certain other particulars.

The contention of counsel for the husband, as I understand it, is this: "The true Christian name and surname" can only mean in this case the surname which the petitioner acquired at birth by reason of her parentage and the Christian name she acquired by subsequent baptism and registration; that under those circumstances she knew her true Christian name and surname, her prospective husband also knew her true Christian name and surname, and if they allowed the banns to be published in any other way there was no due publication of the banns. It is argued that if that did happen, and they allowed the banns to be published in any other way, they did it knowingly and wilfully and, in those circumstances, the marriage must be void. That is, as I understand it, the argument for the husband: that whether or not there was any intention of concealment on the part of the petitioner and respondent at the time they published the banns is a matter which is immaterial; that there has in fact been a breach of the statute and, in those circumstances, the marriage must be void. Counsel for the husband cited a substantial number of authorities, which, he says, purport to bear out that view. I think that I must adopt the reasoning of Lord Merriman P. in the case of *Chipchase* v. *Chipchase* (1). That case was an appeal to the Divisional Court from a decision of justices. The question arose whether the marriage was null and void by reason of the fact that the wife had given a wrong name to the knowledge of both parties when she published the banns. In that case she gave her maiden name, although in fact she

---

"wherein banns may be lawfully "published, unless by special "licence as aforesaid, or shall "knowingly and wilfully intermarry without due publication of "banns, or licence from a person "or persons having authority to "grant the same, first had and "obtained, or shall knowingly and "wilfully consent to or acquiesce "in the solemnization of such "marriage by any person not being "in holy orders, the marriages of "such persons shall be null and "void to all intents and purposes "whatsoever."

(1) [1939] P. 391.

1948

DANCER
v.
DANCER
(HARE
INTER-
VENING;
MARSDEN
CITED).

Ormerod J.

had been married, and she also stated that she was a widow. When it came before the Divisional Court on appeal from the justices, the learned President sent the case back for further inquiry. In his judgment he referred to the words of s. 22 of the Marriage Act, 1823 and said (1): "The wording of the "Act is: 'Provided always, that if any persons shall . . . . "'knowingly and wilfully enter into marriage without due "'publication of banns or licence the marriage of such persons "'shall be null and void to all intents and purposes.' It is "required by s. 7 that the true Christian names and surname "shall be given to the parson for the purpose of publication "of banns. As a matter of history, the cases to which our "attention has been called, *Rex* v. *The Inhabitants of Tibshelf* (2) "and *Rex* v. *The Inhabitants of Wroxton* (3), show quite "plainly that the words 'knowingly and wilfully' were "deliberately introduced into s. 22 of the Act of 1823 in order "to mitigate the hardship which had arisen under the earlier "Act and was exemplified by the case of *Rex* v. *The Inhabitants* "*of Tibshelf* (2)—namely, that it was quite immaterial whether "the falsity in the declaration had arisen by accident or design "and whether such design were fraudulent or not . . . . "The same appears even more clearly in the judgment of Sir "Jenner Fust in *Orme* v. *Holloway* (4), where he says the "construction of this Act is that, in order to set aside a "marriage on the ground of undue publication of banns, it is "necessary for both the parties to be cognizant of the fraud; "it is necessary first to prove that there has been a fraud, "and, secondly, that both parties were cognizant of the fraud "and knowingly and wilfully entered into the marriage without "due publication of banns."

Henn Collins J. was also a member of the court, and he agreed with the reasoning of the learned President. The case of *Chipchase* v. *Chipchase* (5) came before him in the Divorce Court in 1942, when he in fact granted a decree of nullity. As I read that case, the reason for his so doing was that he found as a fact that the respondent gave her maiden name not because she was known by that name and that to give any other name would have been misleading, but because it served to conceal, or at any rate not to emphasize, the fact that she was already married. In other words, Henn Collins J., when dealing with

(1) [1939] P. 391, 397.
(2) (1830) 1 B. & Ad. 190.
(3) (1833) 4 B. & Ad. 640.
(4) (1847) 5 Notes of Cas. 267, 271.
(5) [1942] P. 37.

that case on the petition for nullity granted a decree of nullity because he found as a fact that the reason why the respondent gave her maiden name was the reason of concealment—or, stated another way, she did not give her maiden name for the purposes of avoiding concealment—and that under those circumstances there was an infraction of the statute.

In the present case I am satisfied on the facts that the petitioner, when she went to the vicar and gave the name by which she had been known since the age of three, and explained the facts in full to him, did it deliberately, not in any sense for the purpose of concealing her origin or of concealing her identity but for the purpose of avoiding concealment. She adopted the advice of the vicar, which was: "If you give the name of "Knight, no one will know anything at all about you. If you "give the name of Roberts, which is the name by which you "have always been known in this parish and everywhere else, "then everyone will know who it is who is being married." On that advice and, as I find, with the intention of avoiding any form of concealment, she allowed her name to go forward in the banns as Roberts. In those circumstances, if I adopt the reasoning of the learned President in *Chipchase* v. *Chipchase* (1), I am satisfied that the case before me is one where there has been no undue publication of banns.

Counsel for the husband has cited a number of cases where a marriage has been declared null and void because some name other than the original name of one of the parties has been given. But as I understand those cases there has been in each one of them, in a greater or less degree, an element of fraud or an element of concealment in some form or other. In *Small* v. *Small* (2), which is probably the case which is most in favour of the husband's contention, the only concealment at which one of the parties was aiming was concealment of the fact that he was a deserter from the Royal Field Artillery and had enlisted in another name in another regiment. In those circumstances it may well be that he was anxious to be married in his adopted name for the purpose of avoiding arrest. In *Tooth* v. *Barrow* (3) which was also cited, it is quite clear there that the prospective wife adopted a name other than the name by which she had always been known, for the specific purpose of preventing people in the district knowing that she was the person who was going

---

(1) [1939] P. 391.

(2) (1923) 67 Sol. Jo. 277.

(3) (1854) 1 Spinks, Ecc. & Ad. 371.

1948

DANCER v. DANCER (HARE INTERVENING; MARSDEN CITED).

Ormerod J.

to be married. In *Wormald* v. *Neale and Wormald (otherwise Neale)* (1), a false name was deliberately given because the girl who was going to be married wanted to prevent that fact being known. In this case I am satisfied that there was no intention to deceive, or intention to conceal. Having regard to the judgment of the learned President in *Chipchase* v. *Chipchase* (2), that must be an end of the matter.

There is one further question with which I should deal. Section 7 of the Marriage Act, 1823, provides that the true Christian names and surname should be delivered to the vicar when the banns are published. Therefore the question arises—even supposing that the question of concealment or lack of concealment was not a matter to be considered in the interpretation of s. 22—whether or not the petitioner did in fact give her true Christian name and surname to the vicar at the time when the banns were published. As to the Christian name, of course, there could be no doubt, because she was baptized and registered in that name; the banns were called and she was married in the name of Jessamine. The real question is, accordingly, whether the name of Knight or the name of Roberts is her "true surname," and what is the meaning of the word "true." It is clear in this case that she was born in wedlock, and that her parents' name was Knight. But it is equally true that from the time she remembers anything at all she was known as Roberts, and that up to the age of sixteen she did not know that she had any other name. It is abundantly clear that she had never any intention of being known—apart from marriage—by any other name than Roberts; that Roberts was the name by which she was generally known, the name in which she would sign, the name by which she was known at school, the name to appear on any documents on which her name had to be inscribed, and so on.

In those circumstances, the question arises whether her true surname is that which came to her at birth, or that which became hers by a usage which was so common and complete that it would not be reasonable to say now that her true name was other than Roberts. My attention was drawn by Mr. Fairweather to *Sullivan* v. *Sullivan (otherwise Oldacre)* (3) a case decided long before this Act was passed. My attention was particularly drawn to that part of the judgment dealing with the difficulty of knowing what is a true name and whether a

(1) (1868) 19 L. T. 93.

(2) [1939] P. 391.

(3) (1818) 2 Hagg. Con. 238.

name can be acquired by repute. The judgment first of all deals with illegitimate children, and whether they have the surname of the mother or whether they acquire other names by repute as time goes on, and then it says this (1): "However, if they are much tossed about in the world, in a great "variety of obscure fortunes, as such persons frequently are, "it may be difficult to say for certain what name they have "permanently acquired, as was the case in *Wakefield* v. *Mackay* "(*otherwise Wakefield*) (2). In general it may be said that where "there is the name of baptism and a native surname, those are "the true names, unless they have been overridden by the use of "other names assumed and generally accredited." There is no doubt in this case that the name of baptism, and the native surname—which in the absence of other conditions would be the true names—are the names of Jessamine Knight. But I am completely satisfied to adopt the words of Sir William Scott in the *Wakefield* case (2), that the name of Knight has now been overridden by the use of another name, the name of Roberts, which has been assumed and has been generally accredited.

I am satisfied, in those circumstances, that even if the question of concealment did not enter into the interpretation of s. 22, that on the interpretation of s. 7 of the Act I should be bound to say that the true name of this petitioner, in the sense that it was a name which had been assumed for her and by her, and by which she had been generally known throughout the whole of her conscious life, was the name of Roberts, which was the name by which her banns were called prior to her marriage. That being so, I think that it would be impossible to say that there was not due publication of the banns in this case, and therefore the plea on the cross-petition must fail.

[The case then proceeded on the other issues raised in the pleadings and the wife was granted a decree nisi of divorce on July 1, 1948.]

Solicitors: *J. A. & H. E. Farnfield; Duthie, Hart & Duthie.*

(1) 2 Hagg. Con. 253. (2) (1807) 1 Hagg. Con. 394.

J. B. G.

C. A.

1948

July 13, 15, 18, 16, 30.

Tucker, Bucknill and Somervell L.JJ.

Distinguished.
GORST *v.* GORST
[1952] P. 94

WOODBURY *v.* WOODBURY.

Divorce — Adultery — Connivance — Husband's adulterous association with governess—Discovery by wife—Immediate offer to permit continuance of adultery—General course of conduct indicating wife's desire to preserve marriage and end husband's adultery.

A wife discovered that her husband had been carrying on an adulterous association with the governess of their infant son. While still suffering from shock at the discovery, the wife wrote a letter to the governess in which she referred to her "beloved "husband," to her desire "to be big about it," and to the husband's need for the governess "as a lover and friend." She added that the governess could continue with her husband "as friend and lover," but that she, the governess, must have no "share" in the son of the marriage. A letter written to the husband on the same day was headed "Terms for a peaceful settlement" and contained the same suggestion and proviso. The husband continued the adulterous association and the wife began proceedings for divorce, which she abandoned because she wished to preserve the marriage. Shortly afterwards husband and wife became reconciled and resumed marital relations after the wife had obliged him to choose between divorce or abandonment of the adulterous association. With the husband's consent the wife then left for America with the son, and remained there for some years. During her absence the husband resumed the adulterous association. On the wife's petition for divorce, the husband pleaded connivance.

Held, that the two letters must be regarded in relation to the wife's conduct as a whole, and that she was not in the circumstances guilty of connivance.

Per BUCKNILL L.J. The two letters written after discovery of the adultery did not amount to connivance even though in their literal meaning, and divorced from the circumstances, they might be regarded as a licence to the husband to continue his adulterous association, for no such licence was intended by the wife in fact. As she had shown by her conduct that she greatly desired the association to cease, and had made that desire clear to the other two persons concerned, she was not guilty of connivance even though she had taken no active steps to leave or divorce her husband and had actually suggested to the governess her continuing with him "as friend and lover."

Per TUCKER and SOMERVELL L.JJ. The wife's two letters, had they stood alone, would have amounted to connivance. Her conduct must, however, be viewed as a whole and not by reference to two letters taken in isolation from a large volume of correspondence.

Per SOMERVELL L.J. The wife's letters suggested an arrangement which, if it had been acted on by the parties concerned, would have amounted to connivance. As, however, they were in fact never acted on, and as the wife had been in a distraught condition when she wrote them, she was entitled to have her conduct considered as a whole over a reasonable period, and particularly in the light of the fact that the suggestion that the adulterous association should continue had been made at a time when she felt no hope of being able to stop it and when she was desiring her husband to be reconciled with her.

Quaere (1.) Whether, if the wife had so acted as to promote adultery which would not otherwise have taken place, she would have been guilty of connivance notwithstanding the circumstances.

(2.) Whether, if the wife had been guilty of conniving at adultery taking place after she had written the two letters, she would have been precluded thereby from relying on adultery committed with the same person subsequently to the resumption of marital relations between husband and wife.

Decision of Wallington J. affirmed.

APPEAL from Wallington J.

The appellant and the respondent, his wife, were married in 1929, when the wife was twenty-three and her husband about thirty-nine years old. One child, James, was born in 1931. In 1936, a Miss Macintosh was employed as governess to James. The husband subsequently started to commit adultery with her, with the result that in 1939 she had a child, which died shortly afterwards. The husband and the governess concealed their adulterous intercourse from the wife. When war broke out in 1939, the husband, who was living in London with his wife and James, sent Sylvia Macintosh to Ramsgate with James for his greater safety. In February, 1940, the wife, in consequence of an anonymous letter, went to Ramsgate and asked the governess what were her true relations with her husband. Miss Macintosh confessed to the adultery. This was a great shock to the wife. She took James away from Miss Macintosh and brought him back to London with her. The wife also spoke to her husband about the adultery and begged him to give it up, but he refused. In consequence of the shock, the wife became ill, and in about March, 1940, consulted a doctor, who gave evidence that she was, at that time, "very "nervous and from the mental point of view in a very bad "way, in a hysterical highly nervous tearful state"; that she was not certifiably insane; but that she was hardly responsible for her actions at that time.

While in that condition the wife wrote certain letters to her husband and to Miss Macintosh which, it was argued on behalf of the husband, amounted to connivance at the adultery. On May 2, 1940, the wife went into hospital for an operation in connexion with her nose, and remained there until May 27, 1940. While she was there, the husband, against the wife's wishes, took James back to Miss Macintosh at Ramsgate and continued his adulterous association with her. After the wife came out of hospital, she recovered her son and took him to friends in Wiltshire. She also instructed her solicitors to start divorce proceedings against her husband.

She discontinued those proceedings because she was still fond of her husband and did not wish the marriage to be broken up, and she wrote asking him to meet her in London. When they met in June, 1940, the wife then told the husband that he must choose between a divorce or a complete reconciliation with her, in which case, she suggested, they should live together again in the hope that she might conceive another child by him. At the time it was obvious that there were likely to be heavy bomb attacks on England, and the husband and wife agreed that she should take James to America, where it was hoped that she might give birth to another child. If the husband refused to be reconciled, and to give up his mistress, then, the wife said, she would proceed with the divorce. The husband elected for the reconciliation, but did not tell his wife that Miss Macintosh was again pregnant by him. She in fact gave birth to a child in the following December.

In pursuance of that arrangement the wife came to London on several occasions during the next few weeks and stayed with the husband, and intercourse took place between them. On July 20, 1940, the wife and James and the husband went to Liverpool, where he stayed another two nights with her. She and James then set sail for the United States. In the following month the husband rejoined the army. The wife stayed in America until October, 1947. On April 3, 1947, she filed this petition asking for a divorce on the ground of her husband's adultery with Miss Macintosh in 1940, 1941 and 1947. Adultery in 1940 and in 1947 was formally proved by inquiry agents.

At the trial the husband did not go into the witness box, and no evidence was called on his behalf. It was argued for him that the wife had connived at the husband's adultery, not only by reason of the letters which she wrote to him in 1940, but also because, it was alleged, she must have known that he would go on living with Miss Macintosh after she (the wife) had gone to America. It was contended that the wife must have known of that probability and nevertheless continued to make her husband an allowance.

C. A.
1948
WOODBURY
v.
WOODBURY.

The two letters from the wife, on which the husband chiefly relied as constituting connivance, were written on March 8, 1940, shortly after she learned of her husband's adultery. That written to Miss Macintosh stated: "Dear Sylvia, "After a literally sleepless night and a long talk with my "beloved husband I want to be big about it—he needs you as a "lover and friend quite apart from his fondness for me, for "whom he no longer feels any desire in the way in which you "gratify him—so please go ahead, if you wish, as friend and "lover—it will not hurt me after all I have suffered: but I "cannot give you James as well—that situation is vile and you "have lived this vileness for three years without your Scotch "conscience forcing you to give up an indecent situation, but "now you know that I know you cannot bear it any longer, of "this I am certain. James must become my son and you must "not share him with my husband. Share everything else but "not my legal heir and my dearly beloved only son. Your "goodness to the boy has been perfection but that you could "combine the roles was very far from God-like. I leave you "the half which appeals to you most, the moral aspect of the "whole affair is for God to judge and not for me to comment "on." The second letter, written by the wife to the husband, was as follows: "Terms for a peaceful settlement. (1.) You "share your son with his mother from this day on. (2.) You "continue with Sylvia as her friend and lover. (3.) Is it "(sic) clear that you can still have both James and Sylvia but "on different sides of your life, cleanly and happily, without "agony to your son's mother. At last and for the last time "I will not budge. Your wife. Show to Sylvia please." Wallington J. negatived the husband's plea of connivance and granted the wife a decree nisi. The husband now appealed.

Fairweather for the husband.
Arthian Davies K.C. and *Roland Adams* for the wife.

Cur. adv. vult.

July 30. The following judgments were read.

BUCKNILL L.J. The adultery is admitted, and the only question is whether the wife connived at it. [His Lordship stated the facts substantially in the terms above set out, and continued :] The judge in his judgment commented on the circumstances in which the letters were written as follows, and counsel for the husband did not criticize the statement : "The result of the statements made by the wife in regard to "those letters—all of which I accept as being true, because "I am satisfied that she was a credible witness—is that they "satisfy me that, in writing the things that she did write, "including the letter on which reliance is placed by the husband, "she was using every possible endeavour to induce her husband "to give up this association—not to countenance, but to "indicate the strongest possible objection to, the adultery that "she had discovered was going on ; and for some time after "her first discovery of the horrible state of things she really "was at her wits' end and was beside herself, and in the "condition that the news produced upon her she was trying "to visualize the present and the future. She was trying to "do the best for her husband and the boy, and she was "struggling, in every way she could conceive it possible to "make a struggle, to induce this woman not to continue, "but to discontinue, the adultery with her husband. I cannot "imagine any more that this wife, in these particular circum-"stances, could have done to indicate her abhorrence of what "her husband was doing in complete disregard of the marriage "and in complete disregard of this woman's peace of mind . . . . "I am satisfied that her husband was bringing to bear upon "her, cruelly, the greatest possible pressure at this time in "order to appeal to her not only to consent to his adultery but "also to consent to the boy remaining with the adulteress."

Mr. Fairweather, for the husband, argued that these letters amounted to a licence to the husband to continue his adulterous association with Miss Macintosh. They were certainly not intended as such by the wife, although they may be so regarded in their literal meaning and when divorced from the circumstances in which they were written.

The question then arises whether the wife, in these circumstances, was in law guilty of connivance at her husband's adultery. In so far as it is a question of fact, the judge has decided that the wife did not connive. On this aspect of the case two questions arise : (1.) What are the circumstances in which a wife, who discovers that her husband is carrying on an adulterous intercourse, is guilty of connivance, if he continues the adulterous intercourse ? (2.) How far is the motive of the wife material, when her conduct towards her husband which may appear to tolerate the continuance of adulterous intercourse is under consideration?

As regards the first point, Lord Merriman P., giving the judgment of the Court of Appeal in *Churchman* v. *Churchman* (1) said: "The judge did not deal expressly with the "question whether he regarded the connivance at the continu"ance of the adultery as amounting by ratification to "connivance at the earlier adultery. It would seem that "he regarded connivance at any stage of the adultery "charged as fatal. The point is of importance, because "it is of the essence of connivance that it precedes "the event and, generally speaking, the material event is the "inception of the adultery and not its repetition, although the "facts may be such that connivance at the continuance of an "adulterous association shows that the husband must be taken "to have connived at it from the first."

In the present case, once the adulterous intercourse had started without any fault on the part of the wife, her position, when she did discover it, was very difficult. If she, with a corrupt intention, then behaved in such a way as to promote or encourage the continuance of the adultery, to quote the words used by Lord Merriman P. in *Churchman* v. *Churchman* in another part of his judgment (2), I think that she would be guilty of connivance; but in my opinion "corrupt intention" would mean in this case that the wife showed by her conduct that she willingly consented to the continuance of the adultery. If she showed by her conduct that she greatly desired it to cease, communicated the desire both to her husband and his mistress, and took the best steps available to her, as she thought, to stop it, I do not think that she was guilty of connivance, although at the time she took no active steps to leave her husband or to divorce him, and even suggested to him "to "continue with Sylvia as her friend and lover." The principle which underlies the doctrine of connivance, is that a spouse must come into court with clean hands, and the maxim volenti non fit injuria seems to me inapplicable to such a case as this.

In my opinion, therefore, the letters written by the wife to her husband and the governess after she discovered their adulterous intercourse did not amount to connivance at the husband's adultery during the few months in 1940 between the date of the discovery and the date, in about June, 1940, when

---

(1) [1945] P. 44, 50.

(2) Ibid. 52.

C. A.
1948

WOODBURY
v.
WOODBURY.

Bucknill L.J.

the wife forgave her husband and started to have marital relations with him again on the assumption that he was not going to continue to commit adultery with Miss Macintosh.

It was argued before us that, assuming that the wife did not connive at the husband's adultery in 1940, she nevertheless connived at his subsequent adultery after she went to America. It was suggested that this adultery in fact persisted up to 1947 when the wife presented her petition, and that the wife must have known of it and, by continuing to send her husband an allowance, have encouraged or promoted it. In my view, there was no evidence that the wife knew of his further adultery. On this point Mr. Fairweather asked the permission of the court to put in further letters from the wife to the husband during this period, but we refused permission: to do so might have involved a new trial: the husband gave no reasonable explanation why he had not produced the letters at the original hearing: they were in his possession then, and he could have done so without difficulty. There was nothing in the letters produced at the trial by the husband from the time when the wife left England until 1947 to show that she knew that the adultery was continuing; there was nothing in the husband's letters which the wife produced to indicate that he was committing adultery; and the husband did not go into the witness box to say that he told his wife that he was committing adultery with Miss Macintosh, or that his wife knew about it. I therefore think that there is no evidence that the wife connived at any future adultery, which ended, so far as she knew, with the reconciliation in about June, 1940, until she caused inquiries to be made through her solicitors in 1947.

In my judgment, Wallington J. rightly held that the wife had proved that she had not at any time connived at her husband's adultery, and this appeal should be dismissed.

SOMERVELL L.J. The parties were married in 1929. In 1931 James was born. In 1936 Miss Macintosh, the woman named, was engaged as governess to the boy. It is plain that the wife formed a very high opinion of Miss Macintosh as governess and that they became personal friends. The wife was in America from the end of 1938 to March, 1939. When she returned she found to her surprise and regret that Miss Macintosh had left and that the boy had been sent to a day school. In 1939 husband and wife spent their summer holiday at Deauville and lived together as man and wife. They returned on the outbreak of war. The wife was naturally worried about the boy and the possibility of air raids, and was delighted when the husband told her that he had arranged for Miss Macintosh to come back and look after the boy in a cottage which he had taken for them at Ramsgate. In February, 1940, the wife received an anonymous letter telling her that the husband had spent a summer at Dieppe with Miss Macintosh, at a time when the wife was away. This was a terrible shock to her. The husband at first denied the allegation. The wife went to Ramsgate to see Miss Macintosh, who told her that she had been the husband's mistress since 1937. She also said that she knew that it was very wrong. The wife was convinced that Miss Macintosh was deeply in love with the husband.

It is, I think, difficult to exaggerate the horror which the wife felt at this disclosure. She was deeply in love with her husband. That he should have carried on this adulterous association in the home with the governess to whom she was attached and whom she trusted implicitly, and that her son should have been at Ramsgate with his father and his mistress, was more than could be borne. In her own words, " I was in " a state of grief and misery beyond any description and " memory of it." She brought the boy back with her to London. She had a hysterical conversation with her husband. She remembered that she begged him not to leave her. She believed that she could break up the association.

At a date shortly after this she wrote a letter to her husband in which she was contemplating taking her life. We now come to the documents on which the charge of connivance is based. The husband had told the wife that he would not give up Miss Macintosh sexually : he seemed to see " no sin whatever in it." In the first letter relied on, from the wife to Miss Macintosh, she is urging her to go away as " the only honourable thing." The wife clearly took the view that her best chance was to appeal to Miss Macintosh. There is, I think, no element of connivance in this letter. The documents which raise the issue are two letters to Miss Macintosh of March 8 and 10, 1940, and an undated document headed " Terms for a peaceful settlement." These documents suggested an arrangement which, if persisted in by the three parties concerned, would, in my opinion, have amounted to connivance. The husband was to continue with Miss Macintosh as her friend and lover ; the boy was never to be with them ; the wife was prepared to live with the husband as his friend.

The first point which is clear is that this suggestion was never accepted or acted on by the parties to whom it was made. The wife seems to have been unaware of her legal rights, and clearly believed that she must somehow get the husband to agree not to take the boy with him when he went to commit adultery with Miss Macintosh. To secure this was the main point of the suggestion.

Very shortly after this, in May, 1940, the wife had to go into hospital for an operation. The husband at once takes the boy with him to the cottage at Ramsgate, where he stays with Miss Macintosh. The suggestion, therefore, was not accepted. It is plain that the husband was determined to continue sexual intercourse with Miss Macintosh, if she were willing, and the wife's suggestion in no way contributed to his adultery. So far as Miss Macintosh was concerned, there is evidence in a letter which she wrote on June 10, 1940, when the wife was considering divorce proceedings, that the wife's general attitude, including this, if you will, dishonourably generous suggestion, had made Miss Macintosh angry with the husband for bringing the boy. It is possible that in a half-conscious way the wife put the suggestion forward hoping that it might bring home to Miss Macintosh the misery which she was inflicting, and lead her to give up the husband.

On May 1, 1940, the wife wrote to the husband expressing the hope that he would not continue "this crucifixion indefinitely," and not sacrifice all for the sake of sexual relationship. On June 7, 1940, she wrote to Miss Macintosh making a last appeal to her to give up the husband, and saying that, if not, divorce proceedings would be taken: "The present conduct is wrong and damaging to all three souls. It must not continue." "If you do not give him up, I shall never see him again." "It must be a clean break, one way or the other." All trace of connivance had disappeared.

Before considering the mental condition of the wife during these weeks, the facts may be summarized in this way: a wife, desperately anxious to get her husband back and away from his mistress, is convinced that, at the moment anyhow, this is hopeless. She says, in effect, "I will connive if you will not take our son to your mistress." No attention is paid to the suggestion, and a few weeks later she realizes that this is an impossible and wrong idea altogether.

That the wife throughout this time was in a distraught and hysterical condition is clear from the letters themselves. The first letter in which the suggestion appears begins "After a "literally sleepless night . . . ." In her evidence she said that she did not remember writing the memorandum. It was produced by the husband. She did not remember what she had done with it. "I must obviously have given it to my "husband. My grief and mental stress were so grave it had the "still further effect of undermining my health, which had not "been very good." On May 1, 1940, she had to go into hospital for an operation. "I began to pull myself together with prayer "and thought." In cross-examination she said to the judge: "May I say again everything I wrote in the period was written "in the most appalling distress, and that I would not stand by "it now." A doctor, giving evidence, said, speaking of this time, that she was very nervous and "from the mental point of "view she was in a very bad way." "In a hysterical and "tearful highly nervous state." "On one occasion she sobbed "for a quarter of an hour without ceasing." "She is not certifiably insane, of course . . . . but I would say she was "hardly responsible for her actions at all, at that time."

In delivering the judgment of the court in *Churchman* v. *Churchman* (1) Lord Merriman P. says: "Much of the "difficulty in dealing with the question of connivance arises "from the fact that in the past judges have gone beyond the "facts of the particular case in an attempt to lay down general "principles of wider application. In our opinion it is of the "utmost importance to bear in mind that the issue is whether, "on the facts of the particular case, the husband was or was not "guilty of the corrupt intention of promoting or encouraging "either the initiation or the continuance of the wife's "adultery."

I shall endeavour not to add to the difficulty referred to in the first sentence of this passage. The second sentence contains a concise definition of the essentials of connivance. Bearing in mind this and other statements of the law in cases cited to us, and other cases which I have considered, it might be sufficient to say that I hold that the wife has satisfied me that she was not guilty of connivance.

The facts which have led me to this conclusion are probably sufficiently apparent: where a petitioner is in a distraught and hysterical condition as a result of the discovery of adultery, I think that he or she is entitled to have his or her conduct considered as a whole over a reasonable period of time. It would, therefore, in my opinion be wrong to hold the wife here guilty of connivance on the letters of March, 1940, considered in isolation. She is entitled to be judged in the light of her initial reactions and the attitude which she took up when she recovered from her operation and, indeed, before that, on May 1, 1940. If it could be shown that, in spite of her condition, she had acted in a way which had in fact promoted adultery which would not otherwise have taken place, a question would arise which does not arise here. A case like the present, where the wife on discovering the adultery does her utmost to stop it, where the conduct relied on takes place after she has realized that this is at the moment hopeless, and against a background of hope that the husband will ultimately return: such a case is a long way from what I may call the primary conception of connivance. I am, however, not suggesting that, as a matter of principle, such facts might not be consistent with connivance. This is, I think, a good example of a case which turns on its own particular facts. I have not thought it necessary to set out the documents in full, as they are to be found in Wallington J.'s judgment. Although the main argument on this part of the case is based on documents, the character and credibility of the wife are an important element, and I would naturally have hesitated to differ from the judge, who saw her examined and cross-examined. I agree with his conclusion and, as will be seen, for much the same reasons.

---

(1) [1945] P. 52.

I have little to add to what BUCKNILL L.J. has said on later events. At the meeting in the Green Park, although Miss Macintosh's name was not mentioned, the husband clearly assured the wife that he would give up Miss Macintosh. In the wife's words, "I said to him 'which will you have' and he "chose." It would be unfair, as he gave no evidence, to doubt the sincerity of his intention at that time and on the subsequent occasions when they lived as man and wife. A letter from the wife written on board ship clearly shows that she believed that she had been successful. Miss Macintosh had told her that if the husband had sexual relations with his wife she would have nothing more to do with him. There is, I think, no foundation for the submission that when she went to America she believed that the association with Miss Macintosh would revive. I agree that there is nothing in the letters from America which raises a suspicion of connivance, and that the appeal should be dismissed.

TUCKER L.J. I have had the advantage of reading the judgments which have just been delivered, and I agree that this appeal fails for the reasons stated therein.

The doctrine of connivance is based on the principle that the complaining spouse must come to the court with clean hands and that it would be unconscionable to give relief to one who had been willingly blind to, or had encouraged, the adultery of his or her matrimonial partner. The conduct of the wife must, I think, be viewed as a whole, and not by considering in isolation one or two letters in a large volume of correspondence. I agree with SOMERVELL L.J. that the documents of March 8, 1940, if they stood alone, would clearly amount to connivance; but, viewed in their context, they merely reflect the mental reactions of the wife at one stage of her struggle to put an end to her husband's adulterous association and regain his affection. I venture to think that no reasonable person viewing the correspondence as a whole and accepting the judge's estimate of this wife could regard it as unconscionable that she should be granted the relief which she claims.

In coming to this conclusion I do not wish unduly to stress the state of the wife's health referred to in the medical evidence. She was naturally in great distress, but the letters are not those of an hysterical woman. They display a high degree of clarity of thought and reasoning.

Holding, as I do, that there has been no connivance, I desire to reserve the question whether connivance at adultery in 1940 would necessarily preclude the wife from relying on adultery with the same person in 1947.

Appeal dismissed

Solicitors for the husband: *Tarlo, Lyons & Co.*
Solicitors for the wife: *Blount, Petre & Co.*

R. C. C.

STONE *v.* STONE

C. A.
1948
Oct. 11.

Bucknill, Cohen and Asquith L.JJ.

Divorce — Discretion — Procedure — Hearing in open court — Decision in judge's private room—Decree voidable—New trial.

A decree made by a judge in his private room is voidable because it offends against the fundamental rule that the whole hearing must take place in open court.

Husband's appeal from the order of a county court judge sitting as commissioner.

A husband, aged sixty-three years, petitioned for a divorce on the ground that his wife had deserted him in 1929. He filed a discretion statement in which he admitted committing adultery on one occasion in January, 1940, with a woman, whose name he did not remember, at a hotel. The petition was undefended. The commissioner heard the evidence in support of the petition in open court. The husband gave evidence which clearly showed that his wife had deserted him, but that evidence was uncorroborated. The husband admitted that he had no woman in mind whom he wished to marry if he was granted a divorce. After hearing argument for the husband, also in open court, the commissioner indicated that he was unwilling to grant a decree on the ground that the existing state of affairs was harming nobody and said: "It is not judicial "discretion; it is just inertia letting the case go through. "Mention it later." The case was not mentioned to him later, and at the end of the day he retired to his room. Counsel saw him there, and came out with his brief indorsed "Discretion refused." A formal order was drawn up later stating that the "commissioner has pronounced that the "petitioner has not sufficiently proved the contents of the "the petition"; and that the commissioner had dismissed the petition.

The husband appealed.

Claude Duveen and *A. L. Figgis* for the husband. A divorce judge must give his decree in open court. Otherwise the trial is voidable, *McPherson* v. *McPherson* (1).

[Bucknill L.J. But in that case the whole of the trial was in a private room.]

The principle is to be found in Mr. Wilfrid Greene K.C.'s argument in that case (2). A judge must not adjudicate on matters affecting status in private. I adopt that argument.

[Cohen L.J. But in the present case most of the case was heard in public.]

I rely also on s. 178, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, as modified by s. 4 of the Matrimonial Causes Act, 1937, which provides, "If the court is "satisfied on the evidence . . . . the court shall pronounce a "decree of divorce . . . .," read in conjunction with s. 61, sub-s. 2, of the Act of 1925 which provides, "A judge of the

---

(1) [1936] A. C. 177.
(2) Ibid. 180.

"High Court sitting in court shall be deemed to constitute a "court of the High Court." It follows that a decree can only be pronounced by a judge "sitting in court," and "court" must mean "open court." *Scott* v. *Scott* (1) decided that, with certain exceptions, into which the present case does not fall, the trial of a matrimonial cause must be conducted in open court, see per Viscount Haldane L.C. (2). The order of the commissioner should therefore be set aside and the court should pronounce a decree dissolving the marriage or, alternatively, they should order a new trial. The former course is open to the court because the commissioner clearly came to an erroneous decision. The husband clearly proved desertion and if, in fact, the commissioner exercised his discretion against the husband he did so improperly, *Blunt* v. *Blunt* (3).

BUCKNILL L.J. I think that the view taken by the commissioner was erroneous. It was not a question for him to decide whether the present state of affairs was doing harm to anybody or not. By his final words in court I think he meant that he could not find any principle in *Blunt* v. *Blunt* (3) by which he could properly exercise his discretion. But Viscount Simon L.C. said in that case (4) that one ground on which discretion might be exercised in favour of the petitioner was "the interest of the petitioner, and, in particular, the interest "that the petitioner should be able to remarry and live "respectably." Another consideration which Viscount Simon then said (4) was of primary importance was "the interest of "the community at large, to be judged by maintaining a true "balance between respect for the binding sanctity of marriage "and the social considerations which make it contrary to "public policy to insist on the maintenance of a union which "has utterly broken down." This marriage had obviously utterly broken down. The mere fact that the husband had no woman in mind whom he wished afterwards to marry was no reason for not granting him a decree. How easy it would be for a petitioner to say falsely: "There is somebody whom I am "anxious to marry and she is anxious to marry me." I should not wish a man to be prejudiced because he has been honest and told the truth. I do not know what the commissioner meant by his order. Did he mean that the husband had not sufficiently proved the desertion? If he believed the husband's evidence there was clearly desertion. It is not necessary for a petitioner to call corroborative evidence of desertion. It is desirable and it is usually done, but I do not think it has ever been laid down to be essential. The commissioner may have meant that he did not see any ground for exercising his discretion and on that ground said that he was not satisfied that the husband had sufficiently proved his case. I do not know what he meant.

---

(1) [1913] A. C. 417.
(2) Ibid. 434–438.
(3) [1943] A. C. 517, 525.
(4) Ibid. 525.

But the main difficulty in the case is that the commissioner did not give his judgment in court. I am satisfied that a decree made in a judge's private room is not a valid decree. It is voidable because it offends against the fundamental rule that the hearing of a case, and the whole of the hearing, must take place in open court. The only ground on which an exception is made to that rule is where justice cannot be done unless the case is heard in private. In ordinary circumstances the whole of the case should be heard in open court, and that is essentially so in divorce cases. One can imagine, for instance, what a scandal might arise if the arguments in a case where discretion was asked for were adjourned into the judge's private room and the matter was decided there. On that ground I am satisfied that this order ought to be set aside.

The only other question is whether this court should itself pronounce a decree in the husband's favour or whether it should order a fresh trial. Although I have sympathy for the husband I do not think myself that we ought to grant a decree on the evidence. It is important that a decree should not be granted unless the court is satisfied that the case has been made out. Therefore, in my view, there must be a new trial in this case before another judge.

COHEN L.J. I agree. In concurring that there should be a new trial I am not in the least expressing the view that, even if the evidence were the same as at the hearing below, the court could not properly come to the conclusion that a decree should be granted. It seems to me, having regard to the course that this trial has taken, this court should not grant a decree, seeing that it has not seen or heard the husband give evidence.

ASQUITH L.J. I also agree.

Appeal allowed.
New trial ordered.

Solicitor for the husband: *P. B. Topham, the Law Society.*

R. P. C.

BARBER *v.* BARBER.

1948
Oct. 18.

Willmer J.

Divorce—Evidence—Admissibility of question in cross-examination—Allegation of promiscuous adultery—Particulars of certain specified occasions—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 198.

In a petition for divorce the respondent was charged with promiscuous adultery. Further and better particulars were given of certain specified occasions on which adultery was said to have been committed. The respondent was asked in cross-examination whether she had ever committed adultery and objection was taken to the question.

Held, that although particulars of specified occasions had been given the petitioner was not restricted to those allegations, for the generality of the allegations made in the petition remained. The respondent, having given evidence-in-chief in rebuttal of various specific acts of adultery suggested against her, could in these circumstances properly be asked in cross-examination whether or not she had been guilty of any other acts of adultery.

RULING during a defended divorce suit, in which the husband petitioner sought relief on the ground of his wife's adultery and desertion, as to the admissibility of the following question: "Have you never committed adultery during the whole course "of your married life?"

The petitioner alleged in his petition (*a*) desertion and (*b*) "That the respondent on divers dates unknown, and at a "place or places unknown to the petitioner, had committed "adultery with a man or men unknown to the petitioner."

The nature of the case of adultery was requested, and in response the following further and better particulars were furnished:

> "The nature of the case is that from about a year after "the marriage (which took place in 1920) the respondent "has constantly spent her evenings away from home in the "company of other men, and has boasted to the petitioner "of her adultery with divers men, and has attributed her "pregnancies to adultery. In the year 1938 the respondent "committed adultery with a Lieutenant Commander R.N. "(name unknown) at a hotel (name unknown) in Ashburton "in the County of Devon. The respondent has also "committed adultery with men on dates unknown at the "Dorchester Hotel and Mayfair Hotel in London and at "hotels in Salisbury."

1948

BARBER
v.
BARBER.

Further and better particulars were given of some of the occasions on which the respondent boasted of her adultery and of one or two of the specific occasions on which the respondent was alleged to have committed adultery.

By her answer the respondent denied desertion and adultery and pleaded that if she had committed adultery (which was denied) the petitioner had connived at and condoned the alleged adultery.

S. E. Karminski K.C. (*Trevor Reeve* with him) for the respondent. The question is not admissible. Cross-examination must be confined to the allegations of adultery as particularized, which the respondent has denied. She is protected by s. 198 of the Judicature Act, 1925 (1) from questions outside the adultery alleged and denied.

[WILLMER J. But what is the adultery alleged ? As I understand the petitioner's case it is that for years the respondent has been a promiscuous woman.]

Particulars of that case have been given and the petitioner cannot be allowed a roving commission.

Cyril Salmon K.C. (*H. D. Baskerville* with him) for the petitioner. The allegation on the pleadings is that the respondent has led a promiscuous life. It is true that an allegation cannot be made at the trial which is inconsistent with the particulars given. On the other hand where there is a general allegation and the particulars given under it are not exhaustive, and it is said in effect " we cannot give full particulars of that allegation, but these are some examples of the promiscuity alleged," the position is different. The general allegation of promiscuity and the denial remains on the pleadings and accordingly the respondent may be cross-examined at large about promiscuity. The remedy open to the respondent in such a case is to ask for an interlocutory order that the petitioner be confined at the trial to the matters particularized or that the general allegation of promiscuity be struck out. It may have been considered in this case that such an order would not have been obtained if requested.

---

(1) Supreme Court of Judicature (Consolidation) Act, 1925, s. 198 : " The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery."

WILLMER J. In my judgment the question which it is proposed to ask is a proper question, but in view of the importance of the matter, and in case it may go further, perhaps I had better state my reasons for coming to that conclusion. [His Lordship summarized the pleadings and continued :] The respondent has given evidence-in-chief denying the various particular occasions on which she is alleged to have committed adultery and, in particular, denying the various occasions when she is alleged to have boasted of adultery. In cross-examination Mr. Salmon seeks to ask the question : " Have you ever committed adultery ? " ; and to that question objection is taken by Mr. Karminski, who contends that having regard to the terms of s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925, that is not an admissible question.

The question depends upon what is meant in that section by the words " the alleged adultery." In my judgment " the " alleged adultery " must mean the adultery alleged in the petition, and that adultery is adultery which amounts to a course of conduct pursued over a number of years, that is to say the petitioner charges the respondent generally with being a promiscuous woman and with committing adultery with various men at various times in various places. The fact that he has been required to give particulars of certain specified occasions does not seem to me to detract at all from the generality of the allegation made in the petition.

It is contended by Mr. Karminski that the effect of the particulars delivered was to tie the petitioner down to the particular occasions mentioned in the particulars. In my judgment that is not so ; the general allegation remained, and if the respondent felt embarrassed by a general allegation, not fully satisfied by particulars, it was always open to her to come to the court and obtain an order, as Mr. Salmon pointed out, either striking out the general words of the allegation or limiting the petitioner in his evidence to the acts complained of in the particulars. No such step has been taken in this case, and no attempt has been made by the respondent, or on behalf of the respondent, to get rid of the first allegation in the petition.

From what I have seen of the case so far I think that it is plain that had such an attempt been made it would not have

1948

BARBER v. BARBER.

Willmer J.

succeeded, and that that is the reason why it was not made. The fact is that this is a very exceptional case where the petitioner is forced to rely on what he contends is a long course of conduct instead of alleging particular acts of adultery about which he has specific evidence.

In this particular case it seems to me that that is "the "alleged adultery"; and in my judgment, the respondent, having given evidence-in-chief in rebuttal of various specific acts of adultery suggested against her, can properly be asked in cross-examination whether or not she has been guilty of any other acts of adultery. In those circumstances I rule that the question is admissible.

Solicitors for the petitioner: *James & Charles Dodd.*
Solicitor for the respondent: *L. H. Whitlamsmith.*

J. B. G.

Not followed. PERRING v. PERRING. [1949] 2 All E.R. 334.

1948
Oct. 11.

Mr. Commissioner Blanco-White.

MAYO *v.* MAYO.

Divorce—Evidence of adultery—Birth certificate—Name of father omitted—Births and Deaths Registration Act, 1874 (37 & 38 *Vict.*, *c.* 88), *ss.* 1, 7.

An entry of birth by the mother of a child in a register of births which omits the name of the child's father is tantamount to an admission of adultery by that mother.

HUSBAND'S undefended petition for divorce on the ground of his wife's adultery.

Except for evidence by the petitioner of an oral admission to him by the respondent that her pregnancy was due to an act of adultery the only suggested evidence of adultery was the omission in the register of births of a reference to the father, columns four and six having been left blank by the respondent.

Quintin Hogg for the petitioner.

MR. COMMISSIONER BLANCO-WHITE K.C. This case raises a question which is important in practice and on which the diligence of counsel and, I might add, my own inquiries have been unable to find any authority. If on the registration of the birth of a child by a married woman column four of the register, which should contain the name and surname of the father, and column six, which should contain a statement of his rank or profession, are left blank, is that an admission of adultery? At first sight one would say that it is not such an admission because all that has happened is that the mother has failed to give any information with regard to the matter—from nothing nothing can be deduced. If the statutory provisions and regulations dealing with the registration of births are considered, however, the position appears to be different. To the Births and Deaths Registration Act, 1836, is annexed a schedule in which is shown the form of the register books and that schedule, which is in use to-day, contains a column for the name and surname of the father and a column for his rank and profession. By s. 1 of the Births and Deaths Registration Act of 1874, it is provided: "In the case of every "child born alive after the commencement of this Act, it shall "be the duty of the father and mother of the child . . . . "to give to the registrar, within forty-two days next after such "birth, information of the particulars required to be registered "concerning such birth, and in the presence of the registrar "to sign the register." Under s. 7 it is provided: "In the "case of an illegitimate child no person shall, as father of such "child, be required to give information under this Act con-"cerning the birth of such child, and the registrar shall not "enter in the register the name of any person as father of such "child, unless at the joint request of the mother and of the "person acknowledging himself to be the father of such "child, and such person shall in such case sign the register, "together with the mother."

I have seen the register itself in this case and it is clearly a book entered and kept with scrupulous care. Having looked at the register I am satisfied that all the particulars of the Act have been carefully observed by the registrar of births. The position therefore was this: the mother attended to register the birth of the child; it was her statutory duty, unless the child were illegitimate, to enter the name of the father and his rank or profession; and it is not to be assumed that she would fail to comply with her duty. She did not enter the name and surname of the father or his rank or profession. That must mean, if it is assumed that she was doing her duty, either that she did not know who the father was and therefore was unable to give those particulars, or else that she was admitting that the child was illegitimate. Whichever view is taken there is an admission of adultery, and, following

1948

MAYO
v.
MAYO.

Mr. Commissioner Blanco-White.

Frampton v. *Frampton* (1) an admissible admission of adultery. It is true that it is an expression of her opinion that the child is illegitimate, and in so far as it is an expression of her opinion that the child is illegitimate the evidence is clearly inadmissible under *Russell* v. *Russell* (2), but having regard to the Acts dealing with the registration of births, it is a clear admission that the respondent has committed adultery.

In this particular case, the respondent was seen by her husband when she was pregnant and a conversation took place from which the husband deduced that she admitted that she had committed adultery and, indeed, admitted that the child was illegitimate. On that conversation alone I should not, in this case, have felt justified in acting; but, for the reasons I have given, I regard the entry of the birth by the respondent in the register of births without naming a father as a clear and solemn admission of adultery, and with that corroborative evidence I am satisfied that adultery on her part is proved.

Decree nisi.

Solicitors: *Herbert Baron & Co.*

(1) [1941] P. 24.

(2) [1924] A. C. 687.

J. B. G.

C. A.

1948

Sep. 28, 29; *Oct.* 28.

Lord Morton of Henryton, Bucknill and Asquith L.JJ.

WINNAN *v.* WINNAN.

Divorce—Husband's petition for divorce on ground of desertion—Previous maintenance order against husband—Adjudication by justices on question of desertion—Res judicata—Estoppel—Res judicata not pleaded.

A husband left his wife because she kept a large number of cats in the matrimonial home and refused to get rid of them. The wife obtained a maintenance order against the husband in a court of summary jurisdiction on the ground of his wilful neglect to maintain her. The husband then petitioned for a divorce on the ground (inter alia) of constructive desertion by the wife.

Held (i.) that the wife's conduct in preferring the cats to her husband amounted to constructive desertion by her;

(ii.) that that desertion would have been a good defence to the wife's claim for maintenance in the court of summary jurisdiction;

(iii.) that the justices must therefore have decided that the wife had not been guilty of constructive desertion;

(iv.) that that decision did not estop the husband from subsequently petitioning for a divorce on the ground of such desertion, because (*a*) the principle in *Finney* v. *Finney* (1868) L. R. 1 P. & M. 483 (that where a court dismisses a petition for judicial separation on any ground the petitioner is estopped from subsequently petitioning for a divorce in that court on that ground) does not apply where proceedings in a court of summary jurisdiction are followed by proceedings in the Divorce Court; and (*b*) the subject of litigation in the two proceedings was not the same.

APPEAL from Cassels J.

The parties married in 1920 and lived together for twenty-two years. There were three children of the marriage, born in 1923, 1928 and 1930. The wife frequently accused the husband, falsely, of committing adultery and those accusations affected his health. In October, 1942, he applied for work away from Twickenham, where he and his wife were living, and he was directed to work at Hove. The wife then had five or six cats in their house, which was a small one. During short visits home the husband slept with his wife, their last intercourse being in March, 1944, during his last visit. By that time the number of cats had increased to twenty-five or thirty. The wife allowed them to roam all over the house, and it smelt badly from their excretions. The husband asked her to get rid of them but she replied that cats were her life and her pleasure and that she preferred cats to him. The husband's last visit ended on April 10, 1944. He never returned to the matrimonial home, but he continued to pay his wife an allowance until October, 1944, and to pay the rent of the house until May, 1945.

On May 29, 1945, the wife took out a summons against the husband complaining that he had wilfully neglected to provide reasonable maintenance for her and the third child of the marriage. That summons was heard on July 11, 1945. The husband defended himself without legal assistance, and the Brentford justices made a maintenance order in the wife's favour.

By a petition dated April 17, 1947, the husband prayed for a dissolution of the marriage on the grounds of cruelty and desertion. In support of the allegation of desertion the husband gave evidence of the presence of the cats in the matrimonial home in March and April, 1944, and of his wife's refusal to get rid of them. In reply to a question put to him in cross-examination "Did you not try to put very much the same facts "[to the Brentford justices on July 11, 1945] as you are putting "to the court to-day?" The husband answered "Yes."

Cassels J. held (i.) that the false accusations amounted to cruelty, but that they ceased in October, 1942, and that that cruelty was condoned by subsequent marital intercourse, but (ii.) that the presence of the cats made life in the matrimonial home intolerable for the husband, and that the wife's refusal to get rid of them amounted to constructive desertion. He therefore granted the husband a divorce. The wife appealed.

M. P. Picard for the wife. I concede that the false accusations amounted to cruelty, but that cruelty was condoned. The wife's refusal to get rid of the cats did not amount to constructive desertion. The husband is precluded from alleging desertion by the wife. That issue is res judicata, because it was expressly raised in the proceedings before the Brentford justices on July 11, 1945. The justices could not have found the husband guilty of wilful neglect to maintain the wife if she had deserted him at the time when such neglect was alleged. The husband had put forward before them the facts of which he subsequently gave evidence before Cassels J. The justices, therefore, must have found that in July, 1945, there was no desertion by the wife of the husband and made an adjudication to that effect. The decision in *Kara* v. *Kara and Holman* (1), that, where a petition is brought for a divorce on a ground which has previously been relied on by the petitioner in obtaining a decree of judicial separation in a court of summary jurisdiction, no estoppel is created, having regard to s. 6, sub-s. 2, of the Matrimonial Causes Act, 1937, does not apply where the court of summary jurisdiction has found that a matrimonial offence has not been committed, and the petitioner relies on that offence in the divorce court. A distinction must be drawn between a judgment dismissing a cause of complaint and a judgment finding that the cause of complaint is true. See per Lord Merriman P. in *James* v. *James* (2) and *Hudson* v. *Hudson* (3). The plea of res judicata applies to every point which properly belonged to the subject of previous litigation and which the parties, exercising reasonable diligence, might have brought forward at the time; per Wigram V.-C. in *Henderson* v. *Henderson* (4) approved by Lord Shaw in *Hoystead* v. *Commissioner of Taxation* (5). The justices have found that the husband was guilty of wilful neglect to maintain his wife but they could not have found that if his wife had deserted him at that time. In effect, therefore, the justices have found that at that time the wife had not deserted the husband. The husband is therefore estopped from alleging the contrary. In *Finney* v. *Finney* (1) where a wife petitioned for a judicial separation on the ground of the cruelty of her husband, the judge found that the husband had not been guilty of cruelty and dismissed the petition. On a subsequent petition by the wife for divorce alleging adultery and cruelty, the cruelty being that previously alleged in the earlier petition, the husband contended that the wife was estopped from raising that allegation of cruelty and that contention was upheld. That case is indistinguishable from the present case. It makes no difference that the previous proceedings were proceedings in a court of summary jurisdiction and not in a higher court. In *Stokes* v. *Stokes* (2) it was decided that a wife, whose summons under the Summary Jurisdiction (Married Women) Act, 1895, alleging desertion had been heard and dismissed could not obtain an order on a second summons founded on the same cause of complaint, since the matter was res judicata. In *Whittaker* v. *Whittaker* (3) it was held that a finding of adultery by a county court judge in proceedings instituted by a wife for arrears of maintenance under a separation agreement was binding on a court of summary jurisdiction on a summons by the wife against her husband for wilfully neglecting to provide a reasonable maintenance for her. Subject to s. 6 of the Matrimonial Causes Act, 1937, a finding of any court of competent jurisdiction, whether or not it is a court of record, prevents the same parties from raising the issue on which the finding was based before any other court.

---

(1) [1948] P. 287.

(2) 92 S. J. 126; [1948] 1 All E. R. 214, 217.

(3) [1948] P. 292, 296.

(4) (1843) 3 Hare 100, 114, 115.

(5) [1926] A. C. 155, 170.

E. A. Jessel for the husband. Res judicata was not pleaded in this suit. The summons of May 29, 1945, brought by the wife against her husband was for wilful neglect to maintain; neither cruelty nor desertion was alleged. That being so, as Lord Merrivale P. said in *Papadopoulos* v. *Papadopoulos* (4), the justices could not go further and inquire into the general conduct of the parties. In the present case the husband was sued for wilfully neglecting to maintain his wife; he was bound to maintain her unless she had been guilty of adultery or was in a state of desertion by her own act. No doubt he put forward his account of his wife's cruelty and his account of the increase in the cat population. It may well be that he did not put forward a defence that he was not bound to maintain his wife because she was in a state of desertion. The husband was not legally represented before the court of summary jurisdiction. Hill J. pointed out in *Papadopoulos* v. *Papadopoulos* (1) that it was a defence to a summons against a husband for neglect to provide maintenance that the wife had deserted and was continuing to desert him, but he did not say that constructive desertion would be such a defence. That dictum was followed in *Richardson* v. *Richardson* (2). That question was irrelevant on the summons in the present case. While active desertion, if it had in fact been alleged, would have been a defence, there is no authority for saying that constructive desertion would have had a similar effect. It is not known what defence was put forward. For the plea of res judicata to succeed it must relate not only to the same set of facts but to the same cause of action. If on an application against the husband before a court of summary jurisdiction for wilful neglect to provide reasonable maintenance a wife is unsuccessful, there is nothing to prevent her suing in the High Court on a petition for desertion. In each case she would be a complainant. In the proceedings before the Brentford justices the wife was the complainant and the husband acted only by way of defence. The sole issues before the justices were whether the husband had neglected to maintain his wife and if so what amount he should be ordered to pay his wife. The sole information we have as to the defence put forward was that in the divorce court the husband was asked: "Did you not try to put very much "the same facts as you are putting to the court to-day?" and he answered: "Yes." Even if the justices had decided that the wife had not been guilty of desertion, and that is not known, such a finding would be no bar to the husband subsequently filing a petition for divorce on the ground of such desertion.

---

(1) (1868) L. R. 1 P. & M. 483.

(2) [1911] P. 195.

(3) [1939] W. N. 332; 55 T. L. R. 1070.

(4) [1930] P. 55, 68.

[LORD MORTON OF HENRYTON. The mere fact that the justices ordered the husband to pay so much a week to the wife cannot constitute res judicata as regards desertion.]

No, on any view you must be satisfied that the issue of desertion was in fact considered.

Picard in reply. The petition of the husband referred to the proceedings before the justices. All the facts on which I rely therefore appear on the pleadings and it was unnecessary for a plea of res judicata to be pleaded expressly.

---

(1) [1930] P. 55, 69.

(2) (1942) 167 L. T. 260.

[LORD MORTON OF HENRYTON. Do you say (i.) that it would have been a defence to the summons to prove constructive desertion and (ii.) that as the justices ordered the husband to pay so much a week the issue of constructive desertion is therefore res judicata ?]

I say " Yes " to both those propositions.

[BUCKNILL L.J. Does the justices' order also preclude the husband from saying that the earlier acts of cruelty were revived by the desertion ?]

Yes.

[LORD MORTON. Your argument puts an unduly heavy responsibility on justices.]

There is no authority for distinguishing between the effect, as an estoppel, of a decree of the Divorce Court and an order of a court of summary jurisdiction. If the husband's contention is correct either *Finney* v. *Finney* (1) was wrongly decided or there must be such a distinction. I submit that *Finney* v. *Finney* (1) was rightly decided and that no such distinction can be drawn.

Cur. adv. vult.

Oct. 28. BUCKNILL L.J. Counsel for the wife did not dispute the finding of cruelty. His points were that : (1.) the husband had condoned the cruelty ; (2.) the facts proved by the husband did not amount to desertion by the wife ; and (3.) the allegations as to desertion were res judicata and the husband was estopped from relying upon them in support of his petition.

Cassels J. held that although there was condonation of the previous acts of cruelty by reason of the sexual intercourse up to March, 1944, the wife's later conduct in preferring her cats to him and insisting upon their intolerable presence in the house was a matrimonial offence amounting to constructive desertion. I agree with the decision of Cassels J. on that point. In my opinion such constructive desertion has also revived the condoned cruelty just as much as active desertion would have done. Subject therefore to the point as to res judicata I think that the husband is entitled to a decree of divorce both on the grounds of cruelty and of desertion.

---

(1) L. R. 1 P. & M. 483.

Counsel for the wife argued that the issue whether the wife had been guilty of desertion was res judicata. He argued that the justices could not properly have held the husband guilty of wilful neglect to maintain if the wife had deserted him at the time when such neglect was alleged, and that they must be presumed to have considered the question of such desertion and to have decided the point in the wife's favour, because they made the maintenance order. Mr. Picard argued that the justices had therefore adjudicated on the issue of the wife's desertion, that the matter was res judicata, and that the husband could not allege desertion on the same facts in subsequent divorce proceedings. He further argued that there could be no revival of the earlier condoned cruelty by reason of the subsequent alleged desertion of the wife, because the issue of that desertion had already been decided adversely to the husband by the justices and was res judicata.

Mr. Jessel for the husband took the following points. (1.) The plea of res judicata was not pleaded. (2.) The question whether the wife was guilty of constructive desertion was irrelevant on a summons by her for maintenance on the ground of wilful neglect. (3.) Even if the justices had decided that the wife had not been guilty of desertion nevertheless such a finding would not be a bar to the husband subsequently filing a petition for divorce and alleging such desertion.

As regards the first point, Mr. Picard relied on the fact that the petition of the husband referred to the proceedings before the justices. That had to be done by r. 4 (1.) (*f*) of the Matrimonial Causes Rules, 1947. In my opinion that reference in the petition of the husband does not raise by necessary inference the question of res judicata, and the wife should have raised it expressly in her answer. The result of its absence from the pleadings was that neither side put before Cassels J. any note of the evidence before the justices or of the reasons, if any, for their decision, or any proof that they had in their minds, when arriving at their decision, the issue whether the wife had been guilty of desertion. Under those circumstances counsel for the husband might properly have asked for an adjournment before Cassels J. to deal with the plea of res judicata on the ground that he was taken by surprise. He did not do so, but was content to leave the matter to the decision of the judge. Cassels J. in his judgment on this point, said: "It was said on behalf of the wife that this was res judicata. "The first thing that one has to point out is that that is not "pleaded." I do not think that under all the circumstances this failure in pleading is an effective bar to the point being taken at the trial, and do not think that the wife should be debarred from arguing the point of res judicata before this court.

The second point for our decision is whether the defence of constructive desertion by the wife would have been a good defence to the wife's claim for maintenance on the ground of wilful neglect to maintain. There is authority for saying that active desertion by the wife without cause would be a good defence; see *Richardson* v. *Richardson* (1), a decision of the Divisional Court composed of Henn Collins J. and myself, in which the court followed the dicta of Hill J. in *Papadopoulos* v. *Papadopoulos* (2). In my opinion a husband is not guilty of wilful neglect to maintain a wife who has without cause deserted him and is in a state of desertion at the material time, and I think the same rule applies to the case where a wife has without cause driven her husband out of the house. I therefore feel bound to hold that if the justices tried the case properly, as I presume they did, they must have applied their minds to the question whether the wife had been guilty of constructive desertion and its legal effect on her claim for maintenance, and that their order for maintenance proves that they decided that the wife had not been guilty of constructive desertion.

I now turn to the third point, namely, whether such a decision by the justices estops the husband from subsequently petitioning for a divorce on the ground of such desertion. The scope of the rule of res judicata is stated in *Hoystead* v. *Commissioner of Taxation* (3), in the judgment of the Judicial Committee of the Privy Council, delivered by Lord Shaw: "If in any court "of competent jurisdiction a decision is reached, a party is "estopped from questioning it in a new legal proceeding. "But the principle also extends to any point, whether of "assumption or admission, which was in substance the ratio "of and fundamental to the decision. The rule on this subject "was set forth in the leading case of *Henderson* v. *Henderson* (4) "by Wigram V.-C. as follows: 'I believe I state the rule "'of the court correctly when I say, that where a given matter "'becomes the subject of litigation in, and of adjudication by, "'a court of competent jurisdiction, the court requires the "'parties to that litigation to bring forward their whole case,

(1) (1942) 167 L. T. 260.
(2) [1930] P. 55, 69.
(3) [1926] A. C. 155, 170.
(4) (1843) 3 Hare 100, 114, 115.

C. A.

1948

WINNAN
v.
WINNAN.

Bucknill L.J.

" 'and will not (except under special circumstances) permit " 'the same parties to open the same subject of litigation in " 'respect of matter which might have been brought forward " 'as part of the subject in contest, but which was not brought " 'forward, only because they have, from negligence, inadver- " 'tence, or even accident, omitted part of their case. The " 'plea of res judicata applies, except in special cases, not only " 'to points upon which the court was actually required by the " 'parties to form an opinion and pronounce a judgment, but " 'to every point which properly belonged to the subject of " 'litigation, and which the parties, exercising reasonable " 'diligence, might have brought forward at the time.' This "authority has been frequently referred to and followed, and "is settled law." It will be seen that no distinction is drawn here between decisions of acquittal and decisions of conviction. In *Finney* v. *Finney* (1) a wife petitioned for divorce on the ground of her husband's cruelty and adultery. About a year before, the wife had filed a petition for judicial separation on the ground of cruelty and the allegations of cruelty in that petition were the same as those set out in the petition for divorce. The petition for judicial separation had been heard by the Judge Ordinary, the evidence of cruelty had been given, and the judge had ultimately found that the husband had not been guilty of cruelty, and had dismissed the petition. The husband demurred to the allegations of cruelty being raised again in the second petition and his objection was upheld. The Judge Ordinary, Lord Penzance, in the course of his judgment said (2): "In all the cases cited the question raised "was, either to what extent one court is to be bound by the "judgment of another court, or how far a court is to give effect "to a decision on certain facts pronounced in some other suit "of a wholly different nature. But the questions of fact "raised in this case are precisely the same as those which were "inquired into and determined in a previous suit in this very "court. In both suits the husband is charged with the same "matrimonial offence, that of cruelty. That issue having been "tried, and found in the husband's favour in the former suit, "the wife now seeks to have it tried over again, and it is "argued that she is entitled to reiterate those identical "charges, because she has tacked on them a charge of adultery. "I think that cannot be allowed. According to the practice "of every court, after a matter has once been put in issue and

---

(1) L. R. 1 P. &. M. 483. (2) Ibid. 484.

"tried, and there has been a finding or a verdict on that issue, "and thereupon a judgment, such finding and judgment is "conclusive between the same parties on that issue. In all "courts it would be treated as an estoppel."

If the principle applied in *Finney* v. *Finney* (1) is to be strictly applied to proceedings before a court of summary jurisdiction, followed by proceedings in the Divorce Court, a previous finding of guilt should also act as an estoppel and prevent the guilty spouse from denying his guilt in answer to a divorce petition. But the divorce court cannot be estopped in that way, as was pointed out in the Court of Appeal both in *Harriman* v. *Harriman* (2) and in *Kara* v. *Kara and Holman* (3). In *Kara* v. *Kara and Holman* (3) the husband petitioned for a divorce on the ground of his wife's adultery. The wife by her answer denied the adultery and petitioned for a divorce on the ground of the husband's cruelty. Before the divorce proceedings began the wife had brought proceedings in a court of summary jurisdiction and had obtained a judicial separation on the ground of cruelty similar in nature to that alleged by her in the divorce proceedings. Mr. Commissioner Tyndale K.C. held that the wife had not committed adultery and that the husband had been guilty of cruelty, but the Court of Appeal (Lord Greene M.R., myself and Hodson J.) reversed that decision. The Court of Appeal held that the wife had been guilty of adultery, and did not consider that the finding of cruelty by the court of summary jurisdiction estopped the court from finding that there had been no cruelty. Lord Greene M.R., in the course of his judgment, said (4): "A finding of a court of summary jurisdiction against one "of the parties to a divorce suit who is accused of a matrimonial offence may be admitted as evidence that he or she "has committed the offence charged, but, in our opinion, this "does not absolve the court from examining the evidence given "at the trial upon the issues there raised. In the result, "notwithstanding the decision of the stipendiary magistrate, "the charge of cruelty is not proved to our satisfaction and "the findings of the learned commissioner on this issue must "also be reversed."

Mr. Picard argued that although no estoppel of the parties bound the Divorce Court, that principle only applied where a spouse had been found guilty of a matrimonial offence, and did

---

(1) L. R. 1 P. & M. 483.
(2) [1909] P. 123.
(3) [1948] P. 287.
(4) Ibid. 289.

C. A.

1948

WINNAN v. WINNAN.

Bucknill L.J.

not apply where he or she has been acquitted of such offence. There is no direct authority for that proposition. Lord Merriman P. in *James* v. *James* (1) pointed out that "there "may be a marked distinction . . . . between a judgment "(whether it be a judgment of a court of summary jurisdiction "or of the High Court) which finds a particular offence proved "and where it becomes necessary to investigate the truth of "that finding in some subsequent proceedings, on the one hand, "and, on the other hand, a case where the High Court has "dismissed a charge." After referring to the decisions in *Harriman* v. *Harriman* (2) and *Gooch* v. *Gooch* (3), Lord Merriman P. continued (1): "When it is a question of seeking "to oblige a court to decide something contrary to its own belief "on the facts because some other court has decided in the "affirmative, there is the consideration that so to oblige the "court would be running contrary to the statutory duties "imposed on the court, whereas where a party who has already "been defeated in bringing a claim for relief is trying to do "exactly the same thing again, the same consideration does not "apply to prevent him from being estopped from bringing "that evidence before the court at all." Lord Merriman P. mentioned the point again in *Hudson* v. *Hudson* (4). In that case the Divisional Court had affirmed a decision of a court of summary jurisdiction that the husband had been guilty of cruelty. The wife subsequently petitioned for a divorce in respect of the same cruelty. The husband denied the cruelty in his answer to her petition, and the wife in her reply pleaded that the husband was estopped from denying the cruelty by virtue of the previous decision. Lord Merriman P. held that there was no estoppel in accordance with the principle laid down in *Harriman* v. *Harriman* (2), but again expressed a doubt (5) "whether there is or is not a distinction to be drawn between "a judgment dismissing the cause of complaint and a judgment "finding that the cause of complaint is true," and indicated possible reasons for such a distinction. "The first is that "in *Harriman* v. *Harriman* (2) no doubt was expressed about "the correctness of the decision in *Finney* v. *Finney* (6). . . . "Secondly, it may well be that if the party is estopped by the "earlier decision, the estoppel may operate to prevent that "party from bringing the same charge at all before any other

---

(1) [1948] 1 All E. R. 214, 217.

(2) [1909] P. 123.

(3) [1893] P. 99.

(4) [1948] P. 292.

(5) Ibid. 296.

(6) L. R. 1 P. & M. 483.

"court, whereas the doctrine of estoppel will not operate so "as to abrogate the statutory duty of the court to inquire into "the truth of a petition which is properly brought before it. "Thirdly, I need only add that the decision of the Divisional "Court in *Pratt* v. *Pratt* (1), supports the view that an earlier "dismissal of a charge may be conclusive." In *Pratt* v. *Pratt* (1) a judge of assize dismissed a petition by the husband for a divorce on the ground of the wife's alleged adultery, although a court of summary jurisdiction had found that the wife had been guilty of adultery and had accordingly revoked a separation order which they had previously made in the wife's favour. The wife, after succeeding in her defence in the divorce proceedings, made an application to the justices to restore the order which they had formerly made in her favour, and the justices accordingly revived the order. The husband appealed against that decision to the Divisional Court, but the court dismissed his appeal. That case seems to show that the finding of the judge of the High Court that the wife had not committed adultery was res judicata and conclusive in subsequent proceedings before a court of summary jurisdiction. It does not decide that, if there had been a previous finding by the court of summary jurisdiction that the wife had not committed adultery, such finding would have estopped the husband from petitioning for a divorce on the ground of the same adultery.

When the Matrimonial Causes Act, 1857, created the Divorce Court with its original and unique jurisdiction of granting a decree of divorce on proof of certain matrimonial offences, there were no courts of summary jurisdiction in existence with jurisdiction to grant relief to a wife from her husband for wilful neglect to maintain her. Mere desertion as a ground for divorce was first established by the Matrimonial Causes Act, 1937, s. 2, providing: "A petition for divorce may be pre-"sented to the High Court. . . . either by the husband or the "wife on the ground that the respondent . . . . (*b*) has "deserted the petitioner without cause for a period of at least "three years immediately preceding the presentation of the "petition." Section 4 of that Act has the effect that, on a petition for desertion, the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if the petitioner has during the marriage been guilty of adultery or has been guilty of such wilful neglect or misconduct as has conduced to the desertion. That Act does not confer any jurisdiction on the court to make any decree or order against a husband on the ground of wilful neglect to maintain his wife. When the Act of 1937 was passed, the wife had a statutory right under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, exercisable before a court of summary jurisdiction, to claim an order for maintenance on the ground of the husband's wilful neglect to provide reasonable maintenance for her. Section 6 of that Act provides: "No orders shall be made under this Act "on the application of a married woman if it shall be proved "that such married woman has committed an act of adultery: "Provided that the husband has not condoned or connived at, "or by his wilful neglect or misconduct conduced to such act of "adultery." That Act does not state that the court shall not make an order in the wife's favour if she has herself without cause deserted the husband, neither does it give any remedy to the husband against his wife on the ground of her desertion.

---

(1) (1927) 96 L. J. (P.) 123; 43 T. L. R. 523.

Now, if the argument of res judicata put forward by the wife in the present case is to prevail, the right given by the Act of 1937 to the husband to a decree of divorce on the ground of his wife's desertion will be of no value to him, because the order of the justices against the husband incidentally, and by inference, also decided that his wife was not in desertion at the time when the order was made. Can it be said under those circumstances that the issue of the wife's desertion, assumed to have been considered by the justices, and the right of the husband to petition for a divorce on the ground of her desertion, is the "same subject of litigation" within the definition of res judicata given by Wigram V.-C. in *Henderson* v. *Henderson* (1)? So to hold would, in my opinion, lead to a very undesirable limitation on the jurisdiction of the Divorce Court. Many questions, such as adultery by the wife, condonation, connivance, or neglect or misconduct conducing to such adultery, may be raised before the justices, on a summons for maintenance, and if it is to be held that in every case where the justices have adjudicated on such a summons all those matters are res judicata and that therefore the parties cannot raise any of them in proceedings in the Divorce Court (unless, indeed, the point is one governed by the rule in *Harriman* v. *Harriman* (2)), then I think that the jurisdiction of the Divorce Court would be grievously impaired. Take, for instance, the question of condonation of the wife's adultery. The justices, in proceedings by the wife for maintenance on the ground of

(1) 3 Hare 100, 114, 115.

(2) [1909] P. 123.

her husband's wilful neglect to maintain, might hold that the wife had committed adultery but that the husband had condoned it, and accordingly might make an order. The husband then proceeds to file a petition for divorce on the ground of the wife's adultery and the wife in her answer alleges condonation. Is the matter of condonation res judicata, and may not the husband in his reply allege that he did not condone it? If res judicata applies, then it seems to me that that is a serious impairment of the jurisdiction of the Divorce Court which, under s. 4 of the Act of 1937, has the specific duty on a petition for divorce to inquire into the facts alleged and whether there has been any condonation by the petitioner. The point is bare of authority and I do not find it easy to give any clear-cut reason why the rule of res judicata should not apply here, but I am satisfied that those who first formulated the rule never intended it to apply in such a case as this. In my opinion the appeal should be dismissed.

LORD MORTON OF HENRYTON has authorized me to say that he has read this judgment and that he agrees with it.

ASQUITH L.J. I agree.

Appeal dismissed.

Solicitor for wife: *L. H. Whitlamsmith, The Law Society.*
Solicitors for husband: *Bunker & Co., Hove.*

R. P. C.

In re WINGHAM, DECD.
ANDREWS *v.* WINGHAM.

C. A.
1948
Oct. 12;
Nov. 3.
Bucknill, Cohen and Denning L.JJ.

Probate — Airman training as pilot, in time of war, in Saskatchewan —"Being in actual military service"—Unattested will—Wills Act, 1837 (7 *Will.* 4 *and* 1 *Vict., c.* 26), *s.* 11—*Wills (Soldiers and Sailors) Act,* 1913 (7 *&* 8 *Geo.* 5, *c.* 58), *ss.* 2 *and* 5.

An airman, who had entered the Royal Air Force in February 1942, when an officer training as a pilot at a camp training school in Saskatchewan, Canada, signed, on March 1, 1943, a document which he described as a will, but did not get it attested. He died on August 11, 1943.

Held that the document must be admitted to probate as a valid

C. A.

1948

WINGHAM, DECD., *In re.*

ANDREWS v. WINGHAM.

will, since the airman, when he executed the document was "in "actual military service" within the meaning of s. 11 of the Wills Act, 1837.

Decision of Pilcher J. [1948] P. 138, reversed.

Per curiam: The words in s. 11 "in actual military service" mean "in active military service." The English law as to a soldier's testamentary capacity is not identical with the Roman law as to the privilege of the Roman legionary when "in expeditione," since the former depends on the construction of s. 11. The test in English law is both simple and certain: any soldier, sailor or airman is entitled to the privilege of making a will without any formalities if at the time he is actually serving with the Armed Forces in connexion with military operations which are or have been taking place, or are believed to be imminent.

Per DENNING L.J. The following cases should be regarded as no longer of authority: *In re the Estate of Hill* (1845) 1 Rob. Ecc. 276; *Bowles* v. *Jackson* (1854) 1 Spinks Ecc. & Ad. 294; *In the Estate of Gibson* [1941] P. 118, *n.*; and *In the Estate of Anderson* [1944] P. 1.

APPEAL from a judgment of Pilcher J.

Roy Wingham entered the Royal Air Force in February, 1942. In October, 1942, he was sent overseas to Canada for training in operational duties as an airman. While on this service on March 1, 1943, he wrote out what he described as a will, leaving most of his property to Gwendolen Andrews and the remainder to Ronald Burgess. He signed the document, but did not get it attested. At that time he was an officer training as a pilot at a training school at a camp five miles from the town of North Battleford, Saskatchewan, Canada. On August 11, 1943, after he had become a pilot instructor, he died in hospital from injuries received in an aircraft accident.

Gwendolen Andrews and Ronald Burgess, the plaintiffs, moved before Pilcher J. for a grant of letters of administration with the testamentary document which had been signed by Roy Wingham on March 1, 1943, annexed. Frank Wingham, the father of Roy Wingham (who had been joined as a defendant) appeared in person and submitted that the case did not fall within the terms of s. 11 of the Wills Act, 1837 (1).

(1) Wills Act, 1837, s. 11: "Provided always and be it "further enacted that any soldier "being in actual military service, "or any mariner or seaman "being at sea, may dispose of "his personal estate as he might "have done before the making "of this Act." Section 2 of the Wills (Soldiers and Sailors) Act, 1918, extended s. 11 of the Wills Act, 1837, to any member of His Majesty's naval or marine forces not only when he is at sea, but also when he is so circumstanced that if he were a soldier

Pilcher J. dismissed the motion on the ground that service personnel in time of war who are "in expeditione" or, in the words of s. 11, "in actual military service" are confined at least to those who (1.) are actually engaged upon a campaign; (2.) are proceeding or are under orders to proceed or to hold themselves in readiness to proceed on a campaign; or (3.) are situated in what can properly be called a beleaguered fortress or a war base from which active offensive or defensive operations are being conducted. He declined to accede to the argument for the plaintiffs that in 1943 Saskatchewan should be regarded as a theatre of war, and said that the deceased was sent under orders to a place far removed from the fighting zones to pursue his training without hostile interference, and he held that Roy Wingham was not in actual military service within the meaning of s. 11.

The plaintiffs appealed.

W. Harvey Moore K.C. and *C. A. Emanuel* for the appellants. Roy Wingham was "in actual military service" within the meaning of s. 11 of the Wills Act, 1837, on March 1, 1943, when he made this document, which he described as a will, and signed. The Japanese were in the Aleutians at this time and there were occasional raids on Canada. In modern times, owing to the activities of airmen, the whole world must be considered as the theatre of war. In the case of *In the Goods of Hiscock* (1) it was held that the test to be applied, in considering whether a nuncupative will of a soldier was entitled to probate under s. 11 of the Wills Act, 1837, was whether before the will was made, some step had been taken by the soldier in view of and preparatory to joining the Forces in the field. In that case a private in a volunteer regiment sent in his name for active service in the Boer War, was medically examined and went into barracks on February 19, 1900, at Chichester, preparatory to embarking with his regiment for South Africa on March 10, 1900. Two days before he sailed he made a will whilst under the age of twenty-one years. It was held that at the time he made his will, he was "in actual military service" within the meaning of s. 11. In *Gattward* v. *Knee* (2)

---

he would be in actual military service within the meaning of that section. By s. 5 of the Act of 1918 the expression "soldier" includes a member of the Air Force for the purposes of s. 11 of the Wills Act, 1837.

(1) [1901] P. 78.

(2) [1902] P. 99, 102.

C. A.
1948
WINGHAM, DECD., *In re.*
ANDREWS *v.* WINGHAM.

Sir Francis Jeune P. said: "I have no doubt myself that "mobilization, giving to that word the effect which I understand it to carry, may be fairly taken as a commencement of "that which in Roman law was expressed by the words 'in "'expeditione'." In *Wood* v. *Gossage* (1) in the first world war a soldier when at Cape Town on January 9, 1918, wrote, asking his sister to burn his will. The will was burnt. It was held by the Court of Appeal that, since no formalities are required for a soldier's will, none were required for its revocation and that the will had been effectively revoked by the letter of January 9, 1918, when the soldier was "in actual "military service." These words "in actual military service" were treated as meaning "on active service." It is submitted that the decisions in the cases of *In the Estate of Gibson* (*decd.*) (2) and *In the Estate of Anderson* (*decd.*) (3) cannot be supported. Roy Wingham in proceeding under orders to Canada for further training had taken a step and a necessary step along the path which was destined ultimately to lead him into active combat with the enemy. The training in Canada involved risks from flying, one of the risks of war. (An article on "'Actual Military Service' and Soldiers' Privileged Wills," in 57 L. Q. Rev. (1941) at p. 481 was mentioned.)

The defendant had intimated to the plaintiffs that he did not propose to appear on the appeal, and did not do so.

Cur. adv. vult.

Nov. 3. BUCKNILL L.J. The crucial matter in the opinion of Pilcher J., was that the deceased "by his removal to Canada "was enabled to pursue his training in an area which was not "subject to hostile interference or attack" and the question for our decision is whether this interpretation of the words "being in actual military service" is correct. The meaning of these words have been considered in a number of cases in courts of first instance, not all of them reconcilable with one another. We were only referred to one, that of *Wood* v. *Gossage* (1) in the Court of Appeal, in which the point may be said to have arisen indirectly. In that case the testator was a soldier, and in October, 1915, when he was under orders to proceed with his unit to South Africa, he made a will which strictly complied with the provisions of the Wills Act, 1837.

(1) [1921] P. 194.
(2) [1941] P. 118, *n.*
(3) [1944] P. 1.

On January 9, 1918, while he was in Cape Town, he asked his sister, who was in England and who had then possession of the will, to burn it, as he, the testator, had, as he said, cancelled it. His sister, accordingly, burnt it. The testator subsequently died in November, 1918, in South Africa and the question for the decision of the court was whether the destruction of the will by the sister in England was an effective revocation of the will, having regard to s. 20 of the Wills Act, 1837, the material words of which for the purpose of the case were that no will should be revoked except by the burning of it by the testator or by some person in his presence and at his direction, with the intention of revoking it. Unless, therefore, the testator was held to be on actual military service at the time when his sister burnt the will, the burning of it by her would not act as a revocation of it. The Court of Appeal decided that the testator, being a soldier on active service, was able to revoke this will without the formalities prescribed by the Wills Act, 1837. The case is, I think, important because it appears that the court considered that active service and actual military service have the same meaning. Thus, Younger L.J. (1) said: "Before the Wills Act the special testamentary privileges in "relation to their personal estate which were enjoyed by soldiers "and sailors on active service consisted in their being dispensed "from these formalities of execution required from all other "testators." In this connexion I would point out that the first meaning given to the word "actual" is "active" in the Oxford, the Century and Webster's English dictionaries.

The question, therefore, seems to me to be whether Roy Wingham at the time when he made this will was "on active "military service." What is the test? I do not think the test is whether the airman was in danger from enemy action at the time when the will is made. The test applied by Pilcher J. excludes soldiers who are under orders to hold themselves in readiness to proceed upon a campaign. Such men were held by Sir Francis Jeune P. in *Gattward* v. *Knee* (2) to be on actual military service. In that case there was no danger to the testator at the time when he made the soldier's will. The facts were that the testator was a private in a British infantry regiment and while stationed in Calcutta he wrote a letter containing testamentary dispositions. The letter was written before the outbreak of the Boer War and in it the testator said: "We are just off to South

---

(1) [1921] P. 202. (2) [1902] P. 99, 102.

C. A.
1948

WINGHAM, DECD., *In re.*
ANDREWS *v.* WINGHAM.

Bucknill L.J.

"Africa again for the Boer War—if war is declared at all." It was proved at the trial that on September 7, 1899, the deceased's battalion was warned for service and two days later was ordered to mobilize for active service in South Africa, and sailed from India for South Africa on September 18, 1899. The President found that the letter was written between September 8 and 18 at Calcutta before the ship left. The testator died of enteric fever on February 9, 1900, during the siege of Ladysmith. Sir Francis Jeune P. in the course of his judgment said that mobilization might be fairly taken as a commencement of that which in Roman law was expressed by the words "in expeditione," and continued (1) "it is quite "clear that when a force begins in a sense to engage in or to "enter upon active service, it would be said to be in expedi- "tione."

If the presence of danger arising from enemy activity is not essential in order that a man may be properly described as being on active military service, what is the test of such service? In my opinion the tests are : (*a*) was the testator "on "military service"? (*b*) was such service, "active"? In my opinion the adjective "active" in this connexion confines military service to such service as is directly concerned with operations in a war which is or has been in progress or is imminent. If I apply these tests, then, in my opinion, the deceased was so engaged. He had abandoned his civilian status for the status of a man enrolled in the Royal Air Force at a time when this country was at war, and he had done so for the purpose of taking part in the war. He had in pursuance of this purpose left his home and the ordinary facilities for making a will which a man has in civilian life, and had been ordered overseas for the purpose of becoming more skilled in his work as a belligerent airman. Whilst overseas he was at any time liable to be ordered to proceed to some area in order to take part in active warfare. Under these circumstances, he was in my opinion at the time when he made this will on actual military service, and therefore the document should be admitted to probate as a valid will.

COHEN L.J. I agree that this appeal should be allowed. The question whether the document of March 1, 1943, should be admitted to probate as a testamentary document, depends upon the meaning to be given to the words "in actual military

---

(1) [1902] P. 99.

"service" in s. 11 of the Wills Act, 1837. The meaning of these words has been considered in a number of cases many of which were referred to by Pilcher J. in his careful judgment. Language has been used in some of the cases in particular by Sir Herbert Jenner Fust in *Drummond* v. *Parish* (1), which, it has been suggested, lays down the proposition that under English law the soldier's military testamentary privilege is identical with the privilege of the Roman legionary. That view has been shown to be fallacious by Lord Merrivale P., in *In re Booth* (2). None the less, the authorities do establish that the privilege conferred by s. 11 does not extend to regular soldiers of every description at all times, but only to soldiers who are "in "expeditione." It is important, however, to observe that the courts have not given a narrow meaning to the words "in "expeditione" but have taken a broad view of the circumstances, the existence of which justifies treating a soldier as being "in expeditione," and have had regard to the conditions of warfare from time to time prevalent. Thus, in *Gattward* v. *Knee* (3), Sir Francis Jeune P., treated a soldier as being engaged on an expedition, where his battalion was under orders to mobilize for active service in South Africa. In the case of *In re Kitchen* (4), a soldier who had been ordered to hold himself in readiness for service overseas and when on final draft leave, was held to be entitled to make a privileged will. A similar benevolent construction has been applied to cases arising out of the 1939–45 war. Thus, in the case of *In the Estate of J. King Spark* (5), a soldier serving at the date of the will in the army in camp in Great Britain was held to be in actual military service; so, in *In the Estate of Rowson* (6) was a member of the W.A.A.F. In my opinion these cases were rightly decided and I am unable to distinguish them in principle from the case now before us. In the last war, bombs were dropped on Tokyo by American land-based planes and the range of powerful bombers was steadily increasing. Troops were dropped from the air behind the enemy lines and it seems difficult to define any part of the territory of a belligerent as outside the range of an "expedition." Pilcher J. said that Mr. Harvey Moore's argument amounted to a contention that in the recent hostilities the whole world should be regarded as a theatre of war. I do not think his argument went quite so far as that. I do not think he was considering the position of a soldier on neutral territory. With that possible limitation, I see no reason to reject the argument, though it is sufficient for the present case to say, as my Lord has said, that whilst overseas the deceased was liable at any time to proceed to some area in order to take part in active warfare and that under these circumstances he was in actual military service.

---

(1) (1843) 3 Curt. 522.
(2) [1926] P. 118, 133–5.
(3) [1902] P. 99.
(4) (1919) 35 T. L. R. 612.
(5) [1941] P. 115.
(6) [1944] 2 All E. R. 36.

I cannot part from this case without expressing my doubts whether *In the Estate of Gibson* (1) was rightly decided. The facts are as follows: " A testamentary paper not duly executed " in accordance with the provisions of the Wills Act, 1837, " was put forward as a soldier's will under s. 11 of that Act. " The writing was in the form of a holograph will, purporting " to leave all that Colonel Gibson possessed to his sister, but it " was unsigned. Colonel Gibson was killed when his house " was destroyed by an enemy bomb in October, 1940. He was " then attached to district command headquarters some miles " away, but he lived at home." Henn Collins J., refused to admit the writing to probate on the ground that " a man who " was carrying out professional peace-time duties, although he " was under military authority, was no more a fighting soldier " because he was in the army than an ordinary civilian who, " in the circumstances of the present war, might be said to be " in the front rank of the fighting." Read without regard to the circumstances of the particular case, this ratio decidendi would lead to the conclusion that a surgeon serving in a military hospital or a chaplain serving overseas was not entitled to make a privileged will. If Henn Collins J. meant to go as far as that, his decision is, in my opinion, inconsistent with the cases to which I have referred and must be treated as overruled.

DENNING L.J. Before 1677, there were no formalities required in order to make a will. The Statute of Frauds imposed them, but Sir Leoline Jenkins succeeded in obtaining in the statute a privilege in favour of soldiers and sailors. They were exempted from any formalities. He was an eminent civilian and took the idea from the Roman law. For the first one hundred and seventy-two years that this privilege existed, there was no reported case on it. This is perhaps not so very remarkable. The jurisdiction was confined to the ecclesiastical courts which were not bound by precedents and, until the time of Lord Stowell, their decisions were not reported. Moreover on

---

(1) [1941] P. 118, *n.*

C. A.

1948

WINGHAM, DECD., *In re.* ANDREWS *v.* WINGHAM.

Denning L.J.

this subject they seem to have been content to act on the certificate of the military authorities.

The first case in which the scope of the privilege came under close review was the case of General Drummond in *Drummond* v. *Parish* (1). General Drummond made a will in peace-time whilst serving in Woolwich Barracks, but it was not witnessed. He was held not to be in " actual military service." This is the case which has given rise to all the trouble; for in it Sir Herbert Jenner Fust fell into an error. He thought that, because the idea of a soldier's privilege was taken from the Roman law, therefore " in order to ascertain the extent and " meaning of the exception, the civil law may fairly be resorted " to." Successive courts of first instance have consequently felt themselves bound to ignore the words of the statute and to substitute for them this test: " Can the soldier be considered " as having been so circumstanced that he would under Roman " law have been regarded as ' in expeditione '?" Sitting in this court I am free to say that that test should no longer be applied. The words of our statute are in plain English: " in " actual military service." I find them easier to understand and to apply than the Latin: " in expeditione." If I were to inquire into the Roman law, I could perhaps after some research say how Roman law would have dealt with its soldiers on Hadrian's Wall or in the camp at Chester, but I cannot say how it would have dealt with an airman in Saskatchewan, who is only a day's flying from the enemy. Nor can anyone else. This supposed throw-back to Roman law has confused this branch of the law too long. It is time to get back to the statute. I find myself in full agreement with what Lord Merrivale P. said in the case of *In re Booth* (2): " The proposition that the English law as to the soldier's military testamentary privilege is identical with the privilege of the " Roman legionary is an entirely erroneous proposition."

Rid of this Roman test, this court has to decide what is the proper test. It must be both simple and certain: simple, because it is to be understood by all ranks; certain, because every soldier must be able to apply it without difficulty in the situation in which he finds himself. It is quite beside the mark to inquire what are the reasons for the privilege. The privilege is one thing. The reasons for it are another. The reasons are, no doubt, that a soldier " in actual military " service" is likely to be in danger and to be bereft of legal advice. It would be a great mistake, however, to argue therefrom that a soldier, who is not in danger, or who has legal advice at his elbow, cannot make a soldier's will. That would be to confound the reasons for the rule with the rule itself. The rule is that a soldier "in actual military service" is privileged to make a will without any formalities. The plain meaning of the statutes is that any soldier, sailor or airman is entitled to the privilege, if he is actually serving with the Armed Forces in connexion with military operations which are or have been taking place or are believed to be imminent. It does not, of course, include officers on half-pay or men on the reserve, or the territorials, when not called up for service. They are not actually serving. Nor does it include members of the Forces serving in this country, or on routine garrison duty overseas, in time of peace, when military operations are not imminent. They are actually serving, but are not in actual "military" service, because no military operations are afoot. It does, however, include all our men serving—or called up for service—in the wars: and women too, for that matter. It includes not only those actively engaged with the enemy but all who are training to fight him. It also includes those members of the Forces who, under stress of war, both work at their jobs and man the defences, such as the Home Guard. It includes not only the fighting men but also those who serve in the Forces, doctors, nurses, chaplains, W.R.N.S., A.T.S., and so forth. It includes them all, whether they are in the field or in barracks, in billets or sleeping at home. It includes them although they may be captured by the enemy or interned by neutrals. It includes them not only in time of war but also when war is imminent. After hostilities are ended, it may still include them, as, for instance, when they garrison the countries which we occupy, or when they are engaged in military operations overseas. In all these cases they are plainly "in "actual military service." Doubtful cases may arise in peacetime when a soldier is in, or is about to be sent to, a disturbed area or an isolated post, where he may be involved in military operations. As to these cases, all I say is that, in case of doubt, the serving soldier should be given the benefit of the privilege. I do not stop to discuss all the cases in detail. I need only say that *In re the Estate of Hill* (1) and *Bowles* v. *Jackson* (2), are inconsistent with many later cases: that

---

(1) 3 Curt. 522.

(2) [1926] P. 135.

---

(1) (1845) 1 Rob. Ecc. 276.

(2) (1854) 1 Spinks Ecc. & Ad. 294.

In the Estate of Gibson (1) is inconsistent with a later decision of Hodson J.: and that *In the Estate of Anderson* (2) must be read in the light of the House of Lords decision on the Home Guard. In my opinion, those four cases should no longer be regarded as of authority.

Applying the test I have mentioned, this airman was in "actual military service" and, therefore, I agree that this appeal should be allowed.

Appeal allowed.

Solicitor for the plaintiffs: *Miss C. Morrison.*

(1) [1941] P. 118, *n.*

(2) [1944] P. 1.

C. G. M.

HADLUM *v.* HADLUM.

C. A.
1948
July 7, 8.
Tucker, Bucknill and Somervell L.JJ.

Divorce — Adultery — Evidence — Period of gestation — Birth three hundred and forty-nine days after last opportunity of coitus—Effect of medical evidence.

During a husband's absence abroad on military service his wife gave birth to a normal child weighing 7 lb. 12 ozs. three hundred and forty-nine days after the last opportunity for coitus between husband and wife. All other evidence of adultery by the wife was rejected at the trial of the husband's petition for divorce based on adultery. The medical evidence given for the wife was that fertilization could occur so long as seventeen days after insemination and that, when such a delay occurred, a birth three hundred and forty-nine days after coitus was scientifically possible, though even with such a delay highly improbable. On appeal by the husband against dismissal of his petition:—

Held, that, in face of that evidence, the court was entitled to hold that the length of the period between coitus and birth did not establish that the husband was not the father of the child, and that his petition was therefore rightly dismissed.

Gaskill v. *Gaskill* [1921] P. 425 and *Wood* v. *Wood* [1947] P. 103 considered.

APPEAL from Judge Topham K.C., sitting as a Divorce Commissioner.

The appellant presented a petition for divorce alleging that in or about November, 1944, at an address unknown to him, the respondent, his wife, committed adultery with a man whose name and identity were also unknown to him. In 1944 the husband was a serving soldier. On August 30, 1944, he went overseas, where he remained until July 7, 1945. He left behind him his wife and a child of the marriage, a boy then fourteen months old. There was independent evidence, apart from his own, that he had not since August 28, 1944, seen his wife in circumstances in which he could have connexion with her. On August 12, 1945, three hundred and forty-nine days from August 28, 1944, the wife gave birth to a second child, the length of that period being the foundation for the allegation of adultery with an unknown man in November, 1944.

Raeburn K.C. and *B. A. Harwood* for the husband.
Montagu K.C. and *Seymour Collins* for the wife.

TUCKER L.J. In circumstances such as these, where there has been an interval between the last possible date of coitus and the birth of the child considerably longer than the normal period, the position in divorce cases, so far as these courts are concerned, was considered by Lord Birkenhead in *Gaskill* v. *Gaskill* (1), where he summarized the principles in these words: "I have no doubt that "the principles on which I should act in coming to a con-"clusion of fact upon the evidence in this case are laid down "in *Morris* v. *Davies* (2), where Lord Lyndhurst L.C., sitting "as a judge of first instance, cited with approval the opinion "of the judges in the *Banbury Peerage* case (3): 'That in every "'case where a child is born in lawful wedlock, the husband "'not being separated from his wife by a sentence of divorce, "'sexual intercourse is presumed to have taken place between "'the husband and wife, until that presumption is encountered "'by such evidence as proves to the satisfaction of those who "'are to decide the question, that such sexual intercourse did "'not take place at any time, when by such intercourse the "'husband could, according to the laws of nature, be the father "'of such child.' Lord Lyndhurst goes on to point out that "all that the case of *Head* v. *Head* (4) decided was that the court "must be satisfied that sexual intercourse did not take place "'not upon a mere balance of probabilities, but upon evidence

---

(1) [1921] P. 425, 433.
(2) (1837) 5 Cl. & F. 163, 215.
(3) Le Marchant's *Gardner's case*, App. 437–439.
(4) (1823) 1 Sim. & St. 150.

" ' which must be such as to exclude all doubt, that is, of course, " ' all reasonable doubt, in the minds of the court or jury, " ' to whom that question is submitted.' On the appeal his " decision was affirmed. Lord Lyndhurst again stated his " opinion (1): ' that presumption of law is not lightly to be " ' repelled. It is not to be broken in upon, or shaken by a " ' mere balance of probability; the evidence for the purpose " ' of repelling it must be strong, distinct, satisfactory and " ' conclusive.' I need only mention that Lord Lyndhurst " referred to a sentence of divorce pronounced in accordance " with the law as it then existed, and the rule he stated must be " modified to accord with the present state of the law; but " no point arises here on that aspect of his judgment. It is " true that the observations were made in reference to a legitimacy suit, but I cannot conceive that in the present case any " different principle can apply: . . . . In this case the only " evidence of adultery is the admittedly abnormal length of " pregnancy. No other fact or circumstance has been adduced " which in the slightest degree casts any reflection upon the " chastity or modesty of the respondent, who has on oath " denied the alleged adultery. I can only find her guilty if " I come to the conclusion that it is impossible, having regard " to the present state of medical knowledge and belief, that the " petitioner can be the father of the child. The expert " evidence renders it manifest that there is no such " impossibility."

In the recent case of *Wood* v. *Wood* (2), Lord Merriman P. and Jones J., had before them in the Divisional Court of the Probate Division an appeal from justices where the period between coitus and birth was three hundred and forty-six days, only three days less than the period in the present case. There was no medical evidence before the justices at all there, and the court was asked to take judicial notice of the fact that a period of three hundred and forty-six days was so long that it should hold that the husband could not be the father of the child in question.

Lord Merriman P., after referring to *Gaskill* v. *Gaskill* (3) said (4): " I am not going to say any more about this particular " case than this: we have been asked to say that there comes " a point at which any judge must take judicial knowledge of " the fact that the period is outside nature altogether. I agree.

---

(1) 5 Cl. & F. 265.
(2) [1947] P. 103.
(3) [1921] P. 425.
(4) [1947] P. 105.

C. A.
1948
Hadlum
v.
Hadlum.
Tucker L.J.

"Of course there must come such a point, and the whole "question is whether, in a case in which we have had no "advantage of medical information, no advantage of an "argument on the other side (though Mr. Grant has been most "careful to put everything before us in the clearest possible "way) we are bound to say that that stage has come at a point "fifteen days longer than the period with which Lord Birkenhead dealt in 1921 in similar circumstances, in a case in which, "as here, and, as in the converse case of *Clark* v. *Clark* (1), there "was not a shred of evidence of any adulterous or improper "association between the wife and any man . . . . I absolutely "decline, on the information before us in this case, to say "that we are judicially bound to hold that this period of "three hundred and forty-six days, fifteen days longer than the "period with which Lord Birkenhead was dealing in 1921, is "on the wrong side of any line which can possibly be drawn."

It is quite true that those cases both expressly left open what the position might be where there was some other evidence which mght tend towards proof of adultery. That is to say, there may be a case in which there is a period of time far in excess of the normal, though not exceeding the possible, but in which there are other circumstances from which the court will draw the inference that there has in fact been adultery. It is argued for the husband that this is a case in which there was such other evidence, and it is in connexion with that aspect of the case that it becomes important to consider the view which the judge formed of the witnesses, having seen and heard them in the witness-box. [His Lordship reviewed the evidence, and continued :] I therefore think that other allegations against the wife must be put aside, and that for the purposes of an appellate court we are bound to approach this case on the basis only of the length of time that elapsed between the husband's last meeting with his wife and the birth of the child on August 12, 1945.

How does the matter stand there ? The period is three days longer than in *Wood* v. *Wood* (2). Lord Merriman P. there held that in the absence of medical evidence the court could not take that period as conclusive against the wife. Here there is medical evidence which was called for the wife and supported her case. The integrity and ability of the doctor is not in question. [His Lordship read the transcript of his evidence and continued :]

---

(1) [1939] P. 228.

(2) [1947] P. 103.

Therefore the doctor was in effect saying that here was an abnormally long period, but that, assuming fertilization somewhere about September 14 (the latest date for insemination being August 28), he did not regard it as an impossibility that this child was the husband's, and, furthermore, that insemination in the middle of September was not in any way inconsistent with coitus on August 28. That evidence of his was not really seriously shaken in cross-examination. It is said that the wife's evidence as to her periods has, in some way or another, destroyed the effect of the doctor's evidence. [His Lordship considered the evidence on that point, and continued :] There was nothing like enough material, in my view, to destroy the evidence of the doctor on the assumption of fertilization on about September 14. His evidence showed that it was possible to have intercourse followed by a menstrual period with fertilization thereafter, provided that a period of more than twenty-one days did not elapse. He also said that it was not uncommon for there to be periods of menstruation with a reduced flow after fertilization. It is quite impossible on this medical evidence to say that the conclusion which the doctor formed must be rejected or should have been rejected by the judge for reasons which were to be extracted from the doctor's own evidence with the addition of the evidence given by the wife.

It is quite true that there are a number of peculiar features of this pregnancy some of which have, very naturally, been stressed before us on behalf of the husband : it was pointed out that the child weighed 7 lb. 12 oz. at birth on August 12, 1945, despite an admittedly prolonged period of gestation, and that one would expect the child to weigh a great deal more than that. [His Lordship referred further to the evidence and concluded :] Those are all the matters which could properly be urged against the wife's credibility in the court below. None of them is, to my mind, sufficient to impel us to reject the evidence of the doctor or to infer, despite the emphatic findings of the judge, that adultery did take place and that this husband was not the father of the child. The appeal should be dismissed.

BUCKNILL L.J. I agree with the judge that most ordinary people would come to the conclusion that this child was not the husband's. It is only necessary to state these very simple facts : the last possible date of intercourse was August 28, 1944. The child was born on the following August 12. It was a normal labour and a normal child weighing 7 lb. 12 oz. Apart from the fact that it was born in a caul (which, I think, is not very remarkable) there was nothing in the case to indicate any abnormality whatever. The judge, as I see it, had before him these two propositions: on the one hand he had the question whether this was a scientific impossibility—is it impossible that insemination can produce a normal child eleven and a half months afterwards? On that there was only the evidence of the doctor, who said that it was not a scientific impossibility. There is nothing in the evidence given before Lord Birkenhead in *Gaskill* v. *Gaskill* (1) to show that that was wrong: it is highly improbable, but not scientifically impossible. Then, on the other hand, there was the evidence of the wife, who swore that she had not had intercourse with any other man after her husband had gone overseas. The judge has believed her. He obviously weighed up all the points. I do not think that in a case of this kind it would be proper to criticize that finding. It would not be fair to the wife or to the child.

The only point which has substance is the date of the last menstruation, for I think that the evidence which was before Lord Birkenhead does establish that if there had been a normal menstrual period as late as September 29, a month after the insemination, the child which was subsequently born in August could not have been the result of that insemination. But there is no definite evidence when the last normal menstrual period took place.

A final point is this: these parties lived in Gosport. The husband arrived home before the child was born. He had ample opportunity to make inquiries then about what had been going on in his absence, whether anybody had been staying in the house with his wife and her mother, and so on; but he produced no evidence on that point at all. I agree that this appeal should be dismissed.

SOMERVELL L.J. I agree.

Appeal dismissed.

Solicitors for the appellant husband: *J. C. Hodgson, Law Society, Services' Divorce Department, for C. A. Potter, Law Society, Services' Divorce Department, Bristol.*

Solicitors for the respondent wife: *Blyth, Dutton & Co., for A. C. Kingswell, Gosport.*

R. C. C.

---

(1) [1921] P. 425.

CAVENDISH-BENTINCK *v.* CAVENDISH-BENTINCK.

C. A.

1948
June 24, 25.

Tucker and Bucknill L.JJ. and Pilcher J.

Divorce—Alimony pendente lite—Wife granted decree of judicial separation—Found guilty of adultery on appeal—Application for continuation of alimony pending appeal to House of Lords—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 1, 27, 32, 176, 190, *sub-s.* 3.

A wife in whose favour an order for alimony pendente lite had been made obtained a decree of judicial separation on the ground of her husband's adultery and desertion. On the husband's appeal, the Court of Appeal found the wife guilty of adultery, rescinded the decree of judicial separation, and, exercising its discretion in his favour, granted the husband a decree nisi. The wife was given leave to appeal to the House of Lords. The husband had, after the Court of Appeal's finding against the wife, stopped the allowance which he was making her, and a summons for maintenance taken out by her was adjourned pending the hearing of her appeal to the House of Lords. On her application to the Court of Appeal for an order for alimony pending that appeal:—

Held, that the husband's notice of appeal from the decision of the trial judge revived the lis but not the order for alimony pendente lite which was terminated by the grant of the decree of judicial separation; that the decision of the Court of Appeal rescinding that decree did not operate, specially in view of the finding of adultery against the wife which was involved, to revive the order for alimony pendente lite which had been made in quite different circumstances; that, therefore, the power of the Court of Appeal, if any, to make an order for alimony pendente lite must be under s. 190, sub-s. 3, of the Supreme Court of Judicature (Consolidation) Act, 1925; that, however, the words "the "court" in that sub-section, construed in the light of ss. 1 and 176 of the Act, did not include the Court of Appeal; that that court also did not derive jurisdiction from s. 27 of the Act to make the order applied for, for alimony pendente lite was not in any way incidental to the hearing and determination of the appeal to the Court of Appeal; and that the proper course for the wife was to apply to "the court," that was, the Divorce Division of the High Court for an order for alimony pending final determination of the wife's appeal by the House of Lords.

Application for extension of an order for alimony pendente lite.

On November 1, 1946, an order for alimony pendente lite was made in favour of the applicant wife. On March 27, 1947, Hodson J. granted her a decree of judicial separation on her petition on the ground of the adultery and desertion of her husband, the respondent. He dismissed the husband's prayer for a decree nisi on the ground of his wife's adultery. The

C. A.

1948

CAVENDISH-BENTINCK
v.
CAVENDISH-BENTINCK.

wife did not then apply for a permanent allowance under s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, but the husband made her a voluntary allowance pending his appeal. On April 21, 1947, the husband gave notice of appeal. The appeal was heard in November, 1947, when the Court of Appeal reversed Hodson J.'s finding, found the wife guilty of adultery, exercised its discretion in the husband's favour, and granted him a decree nisi. The wife was given leave to appeal to the House of Lords and liberty to apply for an order for maintenance. The husband, having obtained a finding by the appellate court that his wife had committed adultery, stopped the allowance which he was making her. The wife then took out a summons for a sum to be fixed by way of maintenance. That summons was adjourned pending the hearing of her appeal to the House of Lords. She now applied for alimony pendente lite pending her appeal to the House.

Karminski K.C. and *Ifor Lloyd* for the wife. Normally, on a finding that a wife has been guilty of adultery, her right to alimony pendente lite terminates. That, however, is not a rigid rule of law: discretion undoubtedly remains in the court to continue the alimony pendente lite pending the hearing of the appeal notwithstanding the finding of adultery against the wife. In exercising that discretion, the court has to take into account all the circumstances, including mutual guilt of the spouses—in the present case both are found to have committed adultery. On the authorities, this, it is submitted, is a case where, in view of all the circumstances, the wife should not be left literally penniless, as she has been, pending her appeal to the House of Lords. [Section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925 (1), *Jones* v.

---

(1) By Supreme Court of Judicature (Consolidation) Act, 1925, s. 1, sub-s. 1, the Supreme Court of Judicature is declared to consist of "His Majesty's High Court of "Justice (in this Act referred to "as 'the High Court') and His "Majesty's Court of Appeal (in "this Act referred to as 'the "'Court of Appeal') . . . ."

Section 27, sub-s. 1: "Subject "as otherwise provided in this "Act and to rules of court, the "Court of Appeal shall have jurisdiction to hear and determine "appeals from any judgment or "order of the High Court, and for "all the purposes of and incidental "to the hearing and determination "of any appeal, and the amendment, execution and enforcement "of any judgment or order made "thereon, the Court of Appeal shall "have all the power, authority and "jurisdiction of the High Court."

Section 32: "The jurisdiction "vested in the High Court and the "Court of Appeal respectively

C. A.
1948

CAVENDISH-BENTINCK
v.
CAVENDISH-BENTINCK.

Jones (1) and *Wells* v. *Wells and Hudson* (2) referred to.] In *Dunn* v. *Dunn* (3) it was held that where alimony pendente lite has been allotted to a wife in a petition for divorce the alimony ceases on a verdict finding her guilty of adultery, but that the court may in its discretion make an order for the alimony to continue. In *Jones* v. *Jones* (1) an application to the Judge Ordinary to allot the wife alimony pendente lite pending the hearing of her appeal from dismissal of her petition for judicial separation was adjourned for consideration of the full court.

The court must take into account the mutual guilt of the spouses: see *Welton* v. *Welton* (4) and *Stevenson* v. *Stevenson* (5).

[TUCKER L.J. Does not the jurisdiction in this matter pass to the court before which the lis, that is, the appeal, is pending?]

It is submitted that this court is the right one to exercise the discretion in question. This court is now in the position of the trial judge because it has made a new finding on the facts. The fact that the matter has gone over for some months does not affect the discretion of this court to entertain it.

[TUCKER L.J. Surely, now that the appeal has been entered in the House of Lords, the matter has passed from the cognizance of this court?]

The House of Lords has occasionally made a compendious order for alimony and security for costs. It has never made an order for alimony pendente lite simpliciter.

The necessity for taking all the circumstances into consideration is illustrated by *Bullock* v. *Bullock* (6). It is conceded that the wife here has to establish that she is within one of the well-established exceptions to the rule in *Wells* v. *Wells and Hudson* (2) that alimony pendente lite ceases when the wife's adultery is conclusively proved. She falls, however, within

---

"shall, so far as regards procedure "and practice, be exercised in the "manner provided by this Act or "by rules of court, and where "no special provision is contained "in this Act or in rules of court "with reference thereto, any such "jurisdiction shall be exercised "as nearly as may be in the same "manner as that in which it "might have been exercised by "the court to which it formerly "appertained."

Section 190, sub-s. 3: "On any "petition for divorce or nullity of "marriage the court shall have "the same power to make interim "orders for the payment of money "by way of alimony or otherwise "to the wife as the court has in "proceedings for judicial separ-"ation."

(1) (1872) L. R. 2 P. & M. 333.

(2) (1864) 3 Sw. & Tr. 542.

(3) (1888) 13 P. D. 91.

(4) [1927] P. 162.

(5) [1944] P. 52.

(6) [1942] P. 134.

for the period between determination of the appeal in this court and its final determination in the House of Lords. The wife wishes to ascertain from this court where she is to apply for alimony pendente lite. She only wishes to be told that there is some court which has power to grant it to her. Hodson J.'s order granting the wife a decree of judicial separation automatically terminated her alimony pendente lite.

[BUCKNILL L.J. Might she not have re-applied for it when the appeal to this court was lodged ?]

Yes, but when this court's order on appeal destroyed Hodson J.'s order, it destroyed also the implied consequence—the automatic termination of the alimony.

[TUCKER L.J. That means that our order revived the order for alimony, in which case the wife has her order already.]

What she seeks from this court is an order continuing the original order for alimony pendente lite.

[BUCKNILL L.J. The difficulty in the way of holding that the order of this court on the appeal revived the original order for alimony pendente lite is that it also established adultery against the wife. Would it order alimony to be paid to an adulterous wife ?]

The finding of adultery may destroy the wife's right to alimony, but it still leaves this court a discretion to grant it.

BUCKNILL L.J. [asked by TUCKER L.J. to give the first judgment]. The case has pursued a somewhat complicated course. It seems to me that when on March 27, 1947, Hodson J. granted the applicant wife a decree of judicial separation on the ground of her husband's, the respondent's, adultery and desertion, the original order for pendente lite came to an end, for Hodson J.'s decree was a final one, and there was no lis which was pending. It was open to the wife then to apply to the court for a permanent allowance under s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925. No such application was made, and three weeks later, on April 21, 1947, the husband gave notice of appeal. That notice, I think, revived the lis, but I do not think that it revived the order for alimony pendente lite which had come to an end. The wife could then have applied for an order for alimony, but the husband made her a voluntary payment pending the hearing of the appeal.

The appeal came on for hearing on November 6, 1947, and this court reversed Hodson J.'s decision and granted the husband a decree nisi, exercising its discretion in his favour. Leave was given to the wife to appeal to the House of Lords, with liberty to apply for an order for maintenance. That order of the Court of Appeal was based on a reversal of Hodson J.'s finding that the wife had not committed adultery, for this court came to the conclusion on the evidence that she had done so. The husband, having obtained a finding of the court that his wife had committed adultery, decided to stop the allowance which he had been making her. I express no view on the question whether the husband having himself committed adultery, is entitled to repudiate his liability to maintain his wife on the ground of her adultery. That is a point which has not been argued before us and will no doubt have to be considered at some future time. The wife then took out a summons for a sum to be fixed by way of permanent maintenance. The hearing of that summons was adjourned pending the hearing of her appeal to the House of Lords.

The question now arises whether this court has power to make an order for alimony pendente lite. It has been suggested in argument that the court, having reversed the finding of the judge and the grant of a judicial separation to the wife, has in a sense revived the order for alimony pendente lite which came to an end with the grant of the decree of judicial separation. In my view, that is not so, for the order for alimony pendente lite was made on the assumption that the wife was innocent. The decree of this court is that she is a guilty wife. Therefore, I think that it would be wrong to say that a decree of this court which contained that element, namely, the adultery of the wife, revived an order made under quite different conditions. It seems to me that there is at present no order in existence for alimony pendente lite in favour of the wife. That being so, this court has no power, in my view, to make an order for alimony pendente lite unless it be under s. 190, sub-s. 3, of the Act of 1925, which repeats the last sentence of s. 32 of the Matrimonial Causes Act, 1867. [His Lordship read s. 190, sub-s. 3.]

Is this court "the court" referred to in sub-s. 3? Prima facie, I think that it is not, for s. 176, which concerns matrimonial clauses and matters, begins thus: "A petition for "divorce may be presented to the High Court (in this Part of "this Act referred to as 'the court')." Section 1 of the Act of 1925 sets out the constitution of the Supreme Court, declaring that it consists "of His Majesty's High Court of

C. A.
1948

CAVENDISH-BENTINCK
v.
CAVENDISH-BENTINCK.

for the period between determination of the appeal in this court and its final determination in the House of Lords. The wife wishes to ascertain from this court where she is to apply for alimony pendente lite. She only wishes to be told that there is some court which has power to grant it to her. Hodson J.'s order granting the wife a decree of judicial separation automatically terminated her alimony pendente lite.

[BUCKNILL L.J. Might she not have re-applied for it when the appeal to this court was lodged ?]

Yes, but when this court's order on appeal destroyed Hodson J.'s order, it destroyed also the implied consequence—the automatic termination of the alimony.

[TUCKER L.J. That means that our order revived the order for alimony, in which case the wife has her order already.]

What she seeks from this court is an order continuing the original order for alimony pendente lite.

[BUCKNILL L.J. The difficulty in the way of holding that the order of this court on the appeal revived the original order for alimony pendente lite is that it also established adultery against the wife. Would it order alimony to be paid to an adulterous wife ?]

The finding of adultery may destroy the wife's right to alimony, but it still leaves this court a discretion to grant it.

BUCKNILL L.J. [asked by TUCKER L.J. to give the first judgment]. The case has pursued a somewhat complicated course. It seems to me that when on March 27, 1947, Hodson J. granted the applicant wife a decree of judicial separation on the ground of her husband's, the respondent's, adultery and desertion, the original order for pendente lite came to an end, for Hodson J.'s decree was a final one, and there was no lis which was pending. It was open to the wife then to apply to the court for a permanent allowance under s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925. No such application was made, and three weeks later, on April 21, 1947, the husband gave notice of appeal. That notice, I think, revived the lis, but I do not think that it revived the order for alimony pendente lite which had come to an end. The wife could then have applied for an order for alimony, but the husband made her a voluntary payment pending the hearing of the appeal.

The appeal came on for hearing on November 6, 1947, and this court reversed Hodson J.'s decision and granted the husband a decree nisi, exercising its discretion in his favour. Leave was given to the wife to appeal to the House of Lords, with liberty to apply for an order for maintenance. That order of the Court of Appeal was based on a reversal of Hodson J.'s finding that the wife had not committed adultery, for this court came to the conclusion on the evidence that she had done so. The husband, having obtained a finding of the court that his wife had committed adultery, decided to stop the allowance which he had been making her. I express no view on the question whether the husband having himself committed adultery, is entitled to repudiate his liability to maintain his wife on the ground of her adultery. That is a point which has not been argued before us and will no doubt have to be considered at some future time. The wife then took out a summons for a sum to be fixed by way of permanent maintenance. The hearing of that summons was adjourned pending the hearing of her appeal to the House of Lords.

The question now arises whether this court has power to make an order for alimony pendente lite. It has been suggested in argument that the court, having reversed the finding of the judge and the grant of a judicial separation to the wife, has in a sense revived the order for alimony pendente lite which came to an end with the grant of the decree of judicial separation. In my view, that is not so, for the order for alimony pendente lite was made on the assumption that the wife was innocent. The decree of this court is that she is a guilty wife. Therefore, I think that it would be wrong to say that a decree of this court which contained that element, namely, the adultery of the wife, revived an order made under quite different conditions. It seems to me that there is at present no order in existence for alimony pendente lite in favour of the wife. That being so, this court has no power, in my view, to make an order for alimony pendente lite unless it be under s. 190, sub-s. 3, of the Act of 1925, which repeats the last sentence of s. 32 of the Matrimonial Causes Act, 1867. [His Lordship read s. 190, sub-s. 3.]

Is this court "the court" referred to in sub-s. 3? Prima facie, I think that it is not, for s. 176, which concerns matrimonial clauses and matters, begins thus: "A petition for "divorce may be presented to the High Court (in this Part of "this Act referred to as 'the court')." Section 1 of the Act of 1925 sets out the constitution of the Supreme Court, declaring that it consists "of His Majesty's High Court of was then made at the wife's insistence, but he was unable to have intercourse either on that or on subsequent occasions, and he did not contend otherwise at the hearing.

In the autumn of 1945 the petitioner, whose health had been affected, consulted a doctor. The doctor found no impediment, but he dilated her to make matters still easier for the husband. He impressed the seriousness of the position upon him, and tried to persuade him to have treatment.

By the end of 1945 the wife knew from the doctor that she had grounds for a decree of nullity. In 1946 another doctor took over the husband from the first doctor, but no doctor effected any improvement in him. The wife was anxious to have a child and discussed artificial insemination with her husband. At the end of 1946 she tried, under the guidance of an expert in such matters, to inseminate herself artificially with the husband's seed, but she did not become pregnant. From April to September, 1947, the husband had to be abroad while the wife remained at home. From September to December, 1947, she continued her attempts to inseminate herself artificially from the husband, and there were further ineffective efforts to consummate the marriage. She was urging her husband to have psychological treatment, and in December, 1947, he at last agreed to pay a visit, arranged by her, to a psychologist. The psychologist advised a course of treatment but it would be long, and, in the husband's view, almost impossible for him. As an attempted short cut, the psychologist put forward suggestive treatment by Dr. L., and this treatment the husband was prepared to have. On December 1, 1947, the wife had artificial insemination by an expert from the husband's seed. On December 31, 1947, she had another such insemination. Between those two dates the husband had started a course of treatment from Dr. L., and had paid him nine or ten visits up to January 27, 1948, when the parties ceased to live together. Dr. L.'s treatment was intended to eradicate from the husband the sense of failure caused by his repeated failures to consummate, but it did not make the efforts to consummate any more effective than they had been in the past. But the treatment had an unfortunate result. It consisted largely in instilling confidence in the husband by giving him a card on which was written the information that, after reading the card, his arm would become rigid and thereafter he would feel desire. Twice he tried to consummate the marriage with that help. They were in bed, he read the card, his arm became rigid and he felt desire. Unfortunately the desire was not sufficiently strong or long-lived to achieve its purpose. These attempts differed only from the earlier ones in that they were rough and crude, and appeared to the wife to be just the attempted satisfaction of a physical need.

On January 27, 1948, the petitioner left the respondent and never returned to him. Unknown to her at that time, she was then pregnant, by artificial insemination, of a child who was born in September, 1948, and who was alive when the case was heard. The petitioner admitted that she had had two motives in wishing to conceive a child: a desire for motherhood, and the hope that a child would help her and her husband to have proper intercourse, because she thought that it might relieve the tension caused, possibly, by her over-urgency, and so help her husband to overcome his trouble. There were letters which showed that a desire to establish a normal sex relationship was the dominant factor in the petitioner's mind in wanting a child.

Robert Hughes for the respondent. There has been a want of sincerity on the part of the petitioner, who has given birth to this child. The conception of the child from the husband's seed was the result of a voluntary act by the wife, and by allowing herself to be artificially inseminated she approbated the marriage. In the interest of the child and as a matter of public policy a decree should be refused in these circumstances.

James Stirling for the petitioner. In using the phrase "contrary to public policy" in *G.* v. *M.* (1), Lord Watson is not dealing with public policy at large, but merely stating that it would be contrary to public policy to allow the complaining spouse to act inequitably towards the other spouse. Public policy becomes relevant if an estoppel inter partes has been created by the action of the party seeking relief. In this case the wife's standpoint has been clear throughout the marriage, her letters show that the respondent could never have been deceived as to her attitude. There has been no estoppel inter partes.

On any view of the incidence of public policy a decree should be granted. *Clarke* (*orse. Talbott*) v. *Clarke* (2) and *Dredge* v. *Dredge* (3) show that the legitimacy of a child is by no means a decisive factor. It is in accordance with public policy that the petitioner and the respondent should be freed to contract normal marriages and found families. There is no real possibility of a normal marriage between the petitioner and respondent ; the husband's cure quoad hanc is highly unlikely and the marriage between them has finally broken down. Indeed, it is in accordance with public policy that they should be freed.

---

(1) (1885) 10 App. Cas. 171, 198.

(2) [1942] W. N. 228 ; (1912) L. J. (P.) 41.

(3) [1947] W. N. 71 ; 63 T. L. R. 113.

PEARCE J. In most nullity cases there comes a moment when the most forbearing wife becomes sickened by the role, so unnatural to a sensitive woman, of trying to stimulate an impotent spouse sufficiently to enable him to achieve penetration. I have no doubt that that moment came when the husband added to his impotence the artificiality and crudity induced by Dr. L.'s treatment. Those experiences, on top of a difficult and trying five years, made the wife decide to leave. At the end of January, 1948, she left, determined to end the marriage, and since then they have lived apart and no persuasion has been able to get the wife to go back to him.

It was unhappy that the break in her endurance should have occurred at that moment, since unknown to herself she was pregnant by the artificial insemination, and there was just a chance—though, in my view, a slim one—that the birth of a child might have overcome the husband's psychological trouble, or have resigned the wife to an unnatural marriage. In September, 1948, she gave birth to a boy. I have seen the wife and she was a perfectly honest witness. She seemed to me to be a woman who had tried nobly under very trying conditions to make a success of the marriage, under conditions which inflicted a considerable strain and humiliation which few women can endure indefinitely without serious injury to health, and to return to which, after the break, for further attempt would probably have been intolerable.

In my view this particular marriage has broken down hopelessly, and she could never endure to go back. Dr. L. claims that success was in sight ; but after considering his evidence and the other evidence, I feel sure that success was not in sight at all, and that the only hope for any normal sex life for the husband would be some far more thorough course than Dr. L.'s treatment and probably with some other wife. I think from the respondent's kind and attractive letters that he has some inkling of this, though he does not quite face it.

On those facts, is it my duty to grant or withhold a decree ? I find it a difficult case to decide, and there is little guidance to be had from authority. The husband has not chosen to give evidence, but his counsel says that I ought to refuse a decree on the ground of want of sincerity on the part of the petitioner. This was not pleaded, and in my view it should be pleaded, but there seems doubt whether it must be pleaded. But the husband, in my view, ought not to be excluded from raising that argument. The husband says that the birth of the child should make me refuse a decree ; that because there was a voluntary act by the wife that led to this conception, the court should consider the marriage as approbated, not only in the interest of the parties, but also of the public, and he calls public policy in aid. He also relies on the prospect of a cure of the husband's condition.

The last point I disregard, because from one's experience of such cases, and from the evidence before me, I see no hope of repairing this marriage. It would, I think, be shutting one's eyes to realities to expect this marriage, with this background of failure and neurosis, to become an effective marriage. But the birth of the child is a far more serious matter. It is important to see how this came about. The wife admitted two motives in conceiving the child : a woman's desire for motherhood and the hope that a child would help her and her husband to have proper intercourse, because she thought that it might relieve the tension caused, possibly, by her over-urgency, and so help the husband to overcome his trouble. I entirely believe her when she claims that the latter motive was partly a factor, both because she seems to be very honest and because the letters bear it out. In one letter she says : "Personally I don't look on 'A. I.' as a solution to our problem "but I believe that if only we could have a child then we should "loosen up inside and perhaps help what must be the central "theme of married life." By "the central theme of married "life" she plainly means sexual intercourse between the spouses and there are other letters which make that perfectly clear. Those letters show that a desire to establish a normal sex relationship was the dominant factor in her mind in wanting a child.

As she is an honest witness, one would not expect her to disclaim desire for a child as a motive, since most women desire children. But so far as one can separately assess concurrent motives in a woman, I do not believe that her desire for a child as a mother was the dominant one. She certainly did not have a child with the intention of leaving as soon as she had conceived, and when she left her husband she was unaware that she was pregnant.

Does a child so conceived deprive her of the relief to which otherwise she has a clear right? In *Clarke (orse. Talbott)* v. *Clarke* (1) a decree of nullity was granted to the husband, the respondent in the suit, although a child had been born thirteen years before and for three years the husband had been living with another woman. Pilcher J. there held that there was no want of sincerity. So far as that case helps at all, it is in the wife's favour, since in addition to the birth of the child there was misconduct by the husband, and his object in getting a decree was to remarry. In this case the wife has no desire to remarry, and left home because the sex side of marriage made it intolerable to her and for no other reason. But, as the husband's counsel rightly points out, the birth of the child in *Clarke (orse. Talbott)* v. *Clarke* (1), was due to an accidental freak of fecundation ab extra during an attempt to consummate, while here the conception was a deliberate act by the husband and wife. I do not feel that in this case much help can be obtained from *Clarke (orse. Talbott)* v. *Clarke* (1).

The leading case on this point is *G.* v. *M.* where Lord Selborne says (2): " I think I can perceive that the real basis " of reasoning which underlies that phraseology is this, and " nothing more than this, that there may be conduct on the " part of the person seeking this remedy which ought to estop " that person from having it; as, for instance, any act from " which the inference ought to be drawn that during the " antecedent time the party has, with a knowledge of the facts " and of the law, approbated the marriage which he or she " afterwards seeks to get rid of, or has taken advantages and " derived benefits from the matrimonial relation which it " would be unfair and inequitable to permit him or her, after " having received them, to treat as if no such relation had " ever existed. Well now, that explanation can be referred " to known principles of equitable, and, I may say, of general " jurisprudence. The circumstances which may justify it are " various, and in cases of this kind many sorts of conduct might " exist, taking pecuniary benefits for example, living for a " long time together in the same house or family with the

---

(1) 112 L. J. (P.) 41; [1942] W. N. 228.

(2) 10 App. Cas. 171, 186.

"status and character of husband and wife, after knowledge of "everything which it is material to know. I do not at all mean "to say that there may not be other circumstances which "would produce the same effect; but it appears to me that, "in order to justify any such doctrine as that which has been "insisted upon at the bar, there must be a foundation of "substantial justice, depending upon the acts and conduct of "the party sought to be barred. Further than that I do not "think it necessary for the purpose of this case to go. Of course, "when facts are in dispute, motive may be all important; "but that is not the case here."

In the ordinary meaning of the word "sincerity" the wife was sincere. She was set on making this a normal marriage, and when she found it intolerable she started these proceedings. She has not been actuated by any indirect or improper motive. But from Lord Selborne's opinion I understand that this, though not irrelevant, is not the test. The question is whether one ought to draw inferences from her conduct and acts which would make it inequitable now to give her a decree. But conduct and acts include the contemporaneous expression of her intentions, since conduct or acts may differ according to the words by which they are accompanied. In judging her acts or conduct I must regard the understanding between her and her husband at the time. It would be unreal to infer from her acts a meaning which the husband always knew they did not bear.

If estoppel be the test, then I do not think there is an estoppel as against her husband. An estoppel would arise if on the faith of representations by word or conduct she had induced her husband to alter his position for the worse. Here she has not misled her husband to do anything on the faith of her acquiescence in an abnormal marriage. Her letters and conduct show no such acquiescence. They show rather a determination to bring her marriage to a normal relationship. In one letter she says: "The only security for marriage is the "reality of marriage. This must be striven for at any price." I think that no one could read her letters as meaning that if she is given a child by artificial insemination or adoption she will acquiesce in an impotent marriage. So one essential of estoppel is absent.

The second essential of estoppel is that the husband should have altered his position for the worse. It has not been proved that the husband has done so. Her persistence with the marriage

1948

R. E. L. (OTHERWISE R.) v. E. L.

Pearce J.

desire for a child as a mother was the dominant one. She certainly did not have a child with the intention of leaving as soon as she had conceived, and when she left her husband she was unaware that she was pregnant.

Does a child so conceived deprive her of the relief to which otherwise she has a clear right? In *Clarke* (*orse. Talbott*) v. *Clarke* (1) a decree of nullity was granted to the husband, the respondent in the suit, although a child had been born thirteen years before and for three years the husband had been living with another woman. Pilcher J. there held that there was no want of sincerity. So far as that case helps at all, it is in the wife's favour, since in addition to the birth of the child there was misconduct by the husband, and his object in getting a decree was to remarry. In this case the wife has no desire to remarry, and left home because the sex side of marriage made it intolerable to her and for no other reason. But, as the husband's counsel rightly points out, the birth of the child in *Clarke* (*orse. Talbott*) v. *Clarke* (1), was due to an accidental freak of fecundation ab extra during an attempt to consummate, while here the conception was a deliberate act by the husband and wife. I do not feel that in this case much help can be obtained from *Clarke* (*orse. Talbott*) v. *Clarke* (1).

The leading case on this point is *G.* v. *M.* where Lord Selborne says (2): "I think I can perceive that the real basis "of reasoning which underlies that phraseology is this, and "nothing more than this, that there may be conduct on the "part of the person seeking this remedy which ought to estop "that person from having it; as, for instance, any act from "which the inference ought to be drawn that during the "antecedent time the party has, with a knowledge of the facts "and of the law, approbated the marriage which he or she "afterwards seeks to get rid of, or has taken advantages and "derived benefits from the matrimonial relation which it "would be unfair and inequitable to permit him or her, after "having received them, to treat as if no such relation had "ever existed. Well now, that explanation can be referred "to known principles of equitable, and, I may say, of general "jurisprudence. The circumstances which may justify it are "various, and in cases of this kind many sorts of conduct might "exist, taking pecuniary benefits for example, living for a "long time together in the same house or family with the

(1) 112 L. J. (P.) 41; [1942] W. N. 228.

(2) 10 App. Cas. 171, 186.

"status and character of husband and wife, after knowledge of "everything which it is material to know. I do not at all mean "to say that there may not be other circumstances which "would produce the same effect; but it appears to me that, "in order to justify any such doctrine as that which has been "insisted upon at the bar, there must be a foundation of "substantial justice, depending upon the acts and conduct of "the party sought to be barred. Further than that I do not "think it necessary for the purpose of this case to go. Of course, "when facts are in dispute, motive may be all important; "but that is not the case here."

In the ordinary meaning of the word "sincerity" the wife was sincere. She was set on making this a normal marriage, and when she found it intolerable she started these proceedings. She has not been actuated by any indirect or improper motive. But from Lord Selborne's opinion I understand that this, though not irrelevant, is not the test. The question is whether one ought to draw inferences from her conduct and acts which would make it inequitable now to give her a decree. But conduct and acts include the contemporaneous expression of her intentions, since conduct or acts may differ according to the words by which they are accompanied. In judging her acts or conduct I must regard the understanding between her and her husband at the time. It would be unreal to infer from her acts a meaning which the husband always knew they did not bear.

If estoppel be the test, then I do not think there is an estoppel as against her husband. An estoppel would arise if on the faith of representations by word or conduct she had induced her husband to alter his position for the worse. Here she has not misled her husband to do anything on the faith of her acquiescence in an abnormal marriage. Her letters and conduct show no such acquiescence. They show rather a determination to bring her marriage to a normal relationship. In one letter she says: "The only security for marriage is the "reality of marriage. This must be striven for at any price." I think that no one could read her letters as meaning that if she is given a child by artificial insemination or adoption she will acquiesce in an impotent marriage. So one essential of estoppel is absent.

The second essential of estoppel is that the husband should have altered his position for the worse. It has not been proved that the husband has done so. Her persistence with the marriage for over five years was in his interest. The birth of the child may have made him liable to pay for the child's education, but it has not been shown that he will have to do so. Against that he has the privilege of having had a child by a woman he loved and, apparently, still loves, which is no small privilege to a man. It is difficult to weigh up such things, but I doubt if he will be the loser in the long run by the fact of her having produced a child.

So far as approbation of the marriage is concerned, it must be a question of degree, what acts done, with what intention, constitute approbation. Her letters and her evidence show that she never intended to approbate an abnormal marriage. Until the end she made it clear that she desired and intended to have a normal marriage. I do not regard the conception of the child, serious as it is, when done with the expressed dominant intention of producing normality in their sex relations, to be approbation of an abnormal marriage. I see no authority for saying that public policy makes it my duty to hold that she is estopped or has approbated towards the world at large. The case of *Dredge* v. *Dredge* (1) shows the contrary. There it was held that the fact that a decree would bastardize a child born many years before was no ground for refusing a decree in a belated petition based on wilful refusal. Lord Watson used the words " public policy " in *G.* v. *M.* (2), but only, I think, in connexion with the rights between the spouses in the sense that to allow one spouse to act with glaring inequity as against the other is contrary to public policy.

If I am right, the question of discretion does not arise, and it is irrelevant to weigh the public and private advantages of granting or refusing a decree. If I am wrong, I should, in the exercise of my discretion, grant a decree for these reasons. I see no hope of happiness by keeping these two people married. I am told by his counsel that the husband might divorce the wife for desertion when the time arrives, but there is no certainty of this. If I grant a decree it seems quite possible that the wife, who seems affectionate and likely to be a good wife, may marry again, and even the husband might marry again and conquer his inhibitions and enjoy normal married happiness. The future holds better augury for the child, I think, if I grant the decree than if he is brought up by an embittered mother who may be tied for life to a marriage that has never

(1) [1947] W. N. 71; 63 T. L. R. 113.

(2) 10 App. Cas. 171, 198.

1948

R. E. L.
(OTHERWISE
R.)
v.
E. L.

been a real marriage and which, only through the unnatural aid of science, has produced the fruit of a real marriage.

If the child should be made illegitimate it is most regrettable, but the stigmas of birth are of less effect than they were, and sons are not now judged by the errors of their parents. The few who know of the illegitimacy will probably also know the facts, and in them there is nothing that reflects any dishonour on either parent or on the child.

For those reasons I order a decree nisi on the ground of incapacity, with costs.

Decree nisi of nullity.

Solicitors: *Withers & Co.; Marsden, Burnett & Co., for Faithfull, Gardner & Stanier, Winchester.*

J. B. G.

Dictum of HODSON, J., at p. 225, *explained.* EDWARDS *v.* EDWARDS. [1949] 2 All E.R. 145.

Explained. EDWARDS *v.* EDWARDS [1950] P. 8

BARKER *v.* BARKER.

1948
Dec. 15.

Lord Merriman P. and Hodson J.

Justices—Persistent cruelty—Degree of cruelty—Just cause for leaving—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict., c.* 39), *ss.* 4, 5.

The degree of cruelty which is required to justify an order by justices in favour of a wife on the ground that her husband has been guilty of persistent cruelty to her is at least the same as that required to justify an order on the ground of cruelty in the High Court.

Per HODSON J. The grave and weighty matter which justifies one spouse in leaving the other is very often something different from cruelty; but when dealing with conduct which is either cruelty or not cruelty it is not open to any court to say: "This is not "cruelty, but it is so near it that it amounts to a grave and "weighty matter justifying separation."

HUSBAND'S APPEAL to the Divisional Court from a decision of the justices for the Tunstead and Happing petty sessional division of Norfolk sitting at North Walsham on August 20, 1948, whereby the appellant had been found guilty of persistent cruelty and of wilful neglect to maintain his wife, and ordered to pay her 1*l.* a week.

The parties were married in 1933 and the wife complained of five alleged assaults since the war—one in 1945 after the appellant's demobilization, three in 1947 (in February, August and September) and one on June 19, 1948. Of the two latter

1948

BARKER
v.
BARKER.

incidents the President stated in his judgment : " She had been " struck twice with reference to her association with a man to " which she admitted that her husband raised objections. " She had been slapped twice, I think, is the more accurate " way of describing it."

The respondent left the appellant the day following the last incident, and although the appellant wrote asking her to return, she failed to do so.

H. S. Law for the appellant.
Colin Sleeman for the respondent.

LORD MERRIMAN P. referred to the decision of the magistrates and continued : Included in the summons was a charge of wilful neglect to maintain. The justices have not dealt specifically with that in their reasons, but apparently the order was based on both on the ground of wilful neglect to maintain and of persistent cruelty. A question has arisen whether it is possible to separate these two grounds, so that even if the wife does not succeed on the charge of persistent cruelty she may nevertheless succeed on the ground of wilful neglect to maintain. There is no doubt that from the time when these people parted in June, 1948, the husband had not, in fact, up to the time of the hearing, paid any maintenance for his wife, and it is common ground that the parting was actually brought about by the wife leaving home. It is plain that, in however ungracious a manner, the husband wrote asking her to return to him and expressing his willingness to maintain her in the home. I gather that until the issue of this summons the wife never replied at all, nor did she make any demand for maintenance ; but it is not disputed that there is not a shred of evidence from which it would be possible to infer that, if the parting was brought about otherwise than by the husband's wrongdoing, he has ever consented to pay maintenance to his wife notwithstanding her persistence in living separate and apart. In other words (and without drawing any fine distinction between cruelty and conduct of such a grave and weighty character as to justify the wife in living separate and apart, for on the facts of this case no such distinction falls to be drawn), I think that the case really stands or falls as a whole upon the finding of persistent cruelty. I propose, therefore, to deal with it on that basis.

I am bound to say that this is a case which has given me very considerable anxiety. This court is always impressed with the necessity of paying strict attention to the principles that have been laid down by the highest authority as to the impropriety of an appellate tribunal reversing those who have seen and heard the witnesses except upon some real ground; and it is quite legitimate for Mr. Sleeman, who has argued this case for the wife, to press that point upon us, as he has done most clearly. It was a case, unfortunately, in which no witness was called on either side except the wife and the husband and there was therefore simply a conflict of evidence between the two spouses; but the substance of the matter was this, that the husband was saying that the trouble which had arisen between himself and his wife was because of her preference for the society of another man, and the last two assaults which he admitted were both referable to his objection to the association with this man.

I propose to examine in a little more detail the facts on which the wife's charge of persistent cruelty is based, but before I do that there is one point to which I must refer. It is this. In the course of the hearing our attention was called to the case of *Perks* v. *Perks* (1), the headnote of which contains this passage: "Held"—that is, held by Denning J., as he then was—"(i.) That a court of summary jurisdiction sometimes "acted on a lesser degree of cruelty than that required by "the High Court since the relief granted might be temporary "only and could be discharged subsequently on cause shown. "(ii.) On the facts there was a lesser degree of cruelty which "was also found by the Divisional Court when the order was "varied by deletion of the non-cohabitation clause. Therefore "the order of the justices for maintenance should be discharged." It is of the utmost importance that it should be understood beyond the slightest possibility of misapprehension that at least the same degree of cruelty is required to justify an order in the magistrate's court as in this Division. I use the words "at least" advisedly, because it is possible in the Divorce Division to pronounce a decree of divorce upon a single act of cruelty, if that act comes within the well-known description of cruelty contained in *Russell* v. *Russell* (2); but in s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, the epithet "persistent" precedes the word "cruelty," and that epithet necessarily implies some degree of repetition. With that difference let it be plainly understood that this court, at any rate, has never given the slightest countenance to the suggestion that justices are entitled to find cruelty on anything less than a finding of conduct satisfying the description of cruelty contained in *Russell* v. *Russell* (1), namely, " conduct of such a nature as to cause danger to life " limb or health bodily or mental or as to give rise to a reason-" able apprehension of such danger." I do not think that Denning J., as he then was, meant to lay down any different test in *Perks* v. *Perks* (2) ; but there is a passage on p. 492 of the report which lends some colour to the passage in the headnote to which I have called attention, where he says : " So the court of summary jurisdiction is dealing, so to speak, " with temporary relief whereas the High Court is dealing with " permanent relief, and this difference does sometimes result " in a court of summary jurisdiction acting on a lesser degree " of cruelty than the High Court would." If he was intending to say that that was legitimate I should profoundly dissent from it, but at the end of his judgment the learned judge said (3) : " I desire to add that in these cases, on the wording of the " statutes, I see no reason why a court of summary jurisdiction " should not require cruelty to be proved of the same gravity " and degree as the High Court does," and he goes on to point out that the High Court relies upon findings of cruelty by magistrates' courts as the basis of decrees of divorce. While agreeing with the statement " I see no reason why courts of " summary jurisdiction should not require cruelty to be proved " of the same gravity and degree as the High Court does," I would prefer to put it the other way and to say that I see every reason why they should. Indeed, in *Cornall* v. *Cornall* (4) (which, as it happens, was cited in the argument for another purpose), Sir Samuel Evans P. said that in his opinion the word cruelty in s. 4 of the Act of 1895 meant the same thing as cruelty had always meant in the Divorce Court, but that there had been inserted into the section the word " persistent," and that " persistent cruelty " meant something more than cruelty. I have not troubled to turn up more recent cases, in which I am quite satisfied that the same sort of language has been used ; but I do remember very well that there was a time not so very long ago when it was very necessary to remind magistrates how serious an issue was raised by the charge of cruelty.

---

(1) [1945] 2 All E. R. 491.

(2) [1895] P. 315, 322.

(1) [1895] P. 315, 322.
(2) [1945] 2 All E. R. 491.
(3) Ibid. 493.
(4) (1910) 74 J. P. 379.

1948

BARKER
v.
BARKER.

Lord Merriman P.

I leave it at that, and I propose to approach this case, as I think it must be approached, from the point of view of an inquiry whether there is in substance and in fact evidence in this case which justifies, when taken at its face value against the husband, a finding of conduct of such a nature as to have caused danger to life, limb or health, bodily or mental, or to have given rise to a reasonable apprehension of such danger. I referred a moment ago to the principles upon which appellate tribunals considering evidence on paper should be guided. I do not propose to read out at length the statement of that principle by Lord Sumner in the *S.S. Hontestroom (Owners)* v. *S.S. Sagaporacle (Owners)*; *S.S. Hontestroom (Owners)* v. *S.S. Durham Castle (Owners)* (1), or the more recent pronouncement by Lord Thankerton in *Watts (or Thomas)*, v. *Thomas* (2), in which he said that divorce cases, or consistorial cases, as they are called in Scotland, were a particularly clear example of the principle; but this, at least, is plain, that if the inferior court has misdirected itself (and in that I include, of course, a misdirection as to the nature of the evidence required to constitute the particular offence), or if it has acted upon evidence which the appellate court does not think justifies the finding, the appellate court is not merely entitled but is bound to interfere. That does not involve any estimate of the credibility of the witnesses by those who have not seen the witnesses. It assumes that everything which the justices have found is to be upheld, while at the same time considering whether that ought to have been held to satisfy the legal test.

[His Lordship considered the evidence and continued :] In her evidence the wife said : " I was talking to my friend's " brother on the 19th June when he struck me on the face. " I packed my things that night and came home on the first " bus on Sunday morning. That is where I have been since. " My husband has asked me to go back, but I dare not." It was admitted by the husband that he smacked her face ; it was admitted by the wife that he merely reddened her, that there were no marks or bruises ; and it was finally elicited from her piece-meal that the friend's brother, so-called, was this man with whom the husband said his wife had formed an association, and with regard to whom he said that the wife had made it quite clear that she preferred him to her husband ; so when she says that he had asked her to go back but she dare not, it is material to ask what it was that she dare not face,

---

(1) [1937] A. C. 37, 50.

(2) [1947] A. C. 484, 488.

She had been struck twice, in October, 1947, and in June, 1948, with reference, as I am satisfied on the evidence, to her association with this man. She had been slapped twice, I think, is really the more accurate way of describing it.

I am not going to palliate any infliction of blows on a wife, but it is obviously very material to consider what the circumstances are in which they are inflicted, and if she was acting provocatively, in a way which would legitimately arouse the husband's jealousy, and doing it defiantly, outbursts of violence of this character are understandable if not excusable. [His Lordship considered the circumstances in which the wife had met the man in question on June 19, 1948, how the husband had followed her, had threatened to fight the man (who had made off) and had slapped his wife's face. He continued :] If there is what may fairly be described as a course of conduct of cruelty extending over years, the mere fact that only one comparatively slight incident occurs within the six months is irrelevant ; it is quite enough to give the justices jurisdiction. But I am on a much more important point : whether there is anything here which could satisfy the conscience of a court that anything which this husband did to this wife caused danger to life, limb or health, bodily or mental, or gave rise to a reasonable apprehension of such danger. Taking this evidence at its full value, giving all possible weight to the fact that the justices have seen these parties and accepting as the basis of my judgment that the justices have preferred the wife's account to the husband's account, I cannot bring myself to hold that there is anything here which justifies a finding of cruelty. There was not a shred of evidence that the wife suffered in health in any way whatever. I do not want to lay too much stress upon that. There are some injuries which speak for themselves. If a woman has her head broken open with a hatchet one does not have to call a doctor to say that it has caused danger to life, limb or health, bodily or mental ; and there are certain courses of conduct, other forms of brutality, which do not necessarily involve physical violence, but which a court can see for itself (particularly if it sees the victim in the box) are bound to have caused injury, at least to mental health, though these may be more apt subjects for medical evidence. But here there is not a shred of evidence worth consideration that anything which could fairly be called danger to limb or health ever occurred at all, and I am certainly not prepared to hold that the incidents spread over twelve months speak for themselves and are such as are bound to have caused such injury or reasonable apprehension of such injury. I think that this is one of the cases in which the justices have allowed themselves to be carried away without properly directing their minds to the elements it is necessary to find before they are justified in arriving at the serious finding of cruelty. For these reasons I think this appeal must be allowed and the order set aside.

HODSON J. The decision of the justices was based not only on persistent cruelty but also on wilful neglect to maintain. So far as cruelty itself is concerned, it is clear on authority, to go no farther back than 1857, that the word "cruelty," which has been used in many statutes, always carries the same meaning, as has been judicially determined in many cases, including *Cornall* v. *Cornall* (1), to which my Lord referred. I do not think that there can be any doubt that cruelty, when dealt with by justices and cruelty when dealt with by the High Court, is always the same: it is conduct of the nature which falls within the definition in *Russell* v. *Russell* (2). A footnote in Stone's Justices' Manual, at p. 1041 of the eightieth edition, contains references to a large number of cases under the heading of persistent cruelty, and nearly all those cases are cases in which decisions of the High Court are referred to as illustrating actions or classes of conduct, which have from time to time been held to be cruelty. The observations of Denning J., as he then was, in *Perks* v. *Perks* (3), although they were calculated to lead the learned reporter to state in the headnote that a court of summary jurisdiction sometimes acts on a lesser degree of cruelty than that required by the High Court, since the relief granted might be temporary only and might be discharged subsequently, upon cause being shown, do not, I think, justify that conclusion.

Mr. Sleeman said on the other branch of the case, namely, wilful neglect to maintain, as I think he was bound to say in this case, that something less than cruelty would justify a wife remaining apart from her husband. I think that that is an unsound proposition. It will not do to say that because a grave and weighty matter will justify one spouse in leaving the other, therefore something less than cruelty will do. The grave and weighty matter which justifies one spouse in

---

(1) 74 J. P. 379.
(2) [1895] P. 315, 322.
(3) [1945] 2 All E. R. 491.

1948

BARKER v. BARKER.

Hodson J.

leaving the other is very often something different from cruelty, and something which might even be regarded as more calculated to disrupt family life, such as the persistence in a false allegation of a criminal charge, which was the subject of the decision in *Russell* v. *Russell* (1) itself. Many people might regard this as something worse than cruelty involving the mere infliction of a physical injury causing injury to health. The existence of cruelty depends not on the magnitude but rather on the consequence, actual or apprehended, of the offence; and dealing with conduct which is either cruelty or not cruelty, it is, in my view, not open to any court to say "This is not "cruelty, but is so near it that it amounts to a grave and "weighty matter justifying separation."

The facts in this case have already been analysed, and I do not propose to go through them in detail. I agree that I would not have based a criticism of the justices' finding on the absence of corroboration because, if the incidents which the wife proved (and her evidence was accepted) were such as to justify a finding of cruelty, there was corroboration of two of those incidents in the husband's own evidence; but it is still necessary to consider whether these incidents, isolated incidents, spread over a period of years, can amount to cruelty. [His Lordship referred briefly to them and continued:] The only evidence of injury at all is a statement by the wife that she had some red marks. That is the highest at which she puts it on any of these occasions. Not having received any injury, as I see it, there was no evidence that she had any real apprehension of injury from her husband.

With regard to the last incident, apart from the question of the triviality of the blow (it was a mere smack on the face, humiliating, no doubt, but not violent), which led to the final parting, the position was that the wife was then meeting, by coincidence, as she says, a man to whom she knew her husband objected. She was found with him outside the village hall at about 9.45 p.m. on June 19, 1948. The man disappeared into the hall, and she was left, so far as the evidence shows, alone with her husband, and her husband smacked her face. So far as that incident is concerned, which admittedly is connected with the other man, the action of the husband was not disproportionate to the provocation which the wife's conduct had given, and in my judgment, taking into account the fact that the justices, who have seen the wife and have

(1) [1895] P. 315; [1897] A.C. 395.

assessed the value of her evidence, have accepted her story, the facts which are proved do not justify a finding of persistent cruelty against this man, and this court ought to reverse that finding. There being, in my opinion, no other matter apart from persistent cruelty which justifies the wife in remaining away from her husband from June 19, so as to put her in a position to claim separate maintenance, that ground of the order also falls, and the husband's appeal should succeed.

Appeal allowed.

Solicitors: *Peacock & Goddard, for Hill & Perks, Norwich; Daynes, Keefe & Co., Norwich.*

J. B. G.

Applied. EVERITT *v.* EVERITT. [1949] 1 All E.R. 908.

Discussed and distinguished. BARTRAM *v.* BARTRAM. [1949] 2 All E.R. 270.

Distinguished. BARTRAM *v.* BARTRAM [1950] P. 1

Considered. EVERITT *v.* EVERITT [1949] P. 374

Considered. WHEATLEY *v.* WHEATLEY [1950] 1 K. B. 39

HOPES *v.* HOPES

C. A

1948
Oct. 21;
Nov. 3.

Bucknill and Denning L.JJ. and Harman J.

Divorce—Desertion—Husband and wife living in same house—No marital relations for thirteen years—Spouses occupy separate bedrooms—No mending or washing of husband's clothes or separate cooking for husband by wife—Living rooms occupied by family consisting of husband, wife and two daughters—Meals for family cooked by wife—Constant feud between spouses terminating in husband leaving the house—No de facto separation before that time.

To establish the matrimonial offence of desertion both de facto separation and an animus deserendi must be proved.

Where a man, his wife and two daughters constitute one household sharing the same living room, kitchen, stairs, passages and offices, although the spouses always occupy separate bedrooms and the wife behaves in such a way to her husband as to indicate that she wishes him to depart from the house and not return there, there is in such circumstances no de facto separation, and can be no desertion by the wife. Gross neglect or chronic discord is not a ground for divorce. But if the conduct of the wife in fact compels the husband to leave the matrimonial home, there may be constructive desertion by the wife as from the time of the husband leaving the home.

Smith v. *Smith* [1940] P. 49; *Wilkes* v. *Wilkes* [1943] P. 41 and *Shilston* v. *Shilston* (1945) 174 L. T. 105, cases where husband and wife were living under the same roof, but as two households, distinguished.

Wanbon v. *Wanbon* [1946] 2 All E. R. 366 doubted.

Evans v. *Evans* [1948] 1 K. B. 175 disapproved by DENNING L.J.

C. A.
1948

HOPES
v.
HOPES.

APPEAL from a decision of Mr. Commissioner Richardson, who granted a decree of divorce to a husband on the ground of his wife's desertion for three years immediately preceding the presentation of his petition dated June 27, 1947. There was also in the petition an allegation of cruelty, which, it was claimed, injured the husband's health. The commissioner found that the wife had deserted her husband since 1934, but made no finding on the issue of cruelty.

The spouses Jasper and May Hopes were married in 1916 and the husband was now fifty-eight and the wife fifty-two years of age. There were two daughters of the marriage now aged thirty and twenty-two. There had been no marital intercourse since 1934, when the wife started to occupy a separate bedroom. The immediate cause of this was that the husband had to leave for work very early and so, going early to bed, objected to his wife coming to bed after he had retired. It did not appear that after 1934 the husband ever asked the wife for marital relations or that she ever suggested them. Their friendship gradually ceased. The wife objected to the husband going out at night in connexion with some concert party of which he was a member, she abused his friends, and appeared to have done nothing for his comfort. The husband said that the quarrels between them were so frequent that he often retired to his bedroom for the sake of peace. He alleged that his wife did no mending or washing of his clothing and no separate cooking for him, but the evidence was that he always had his meals, which were cooked by the wife, in the common dining room with the other members of the family and, when not in his bedroom, he shared the rest of the house with his wife and their daughters. The husband admitted that the wife was a good mother to his children, and there was evidence that she was much crippled with rheumatism. The feud between the parents resulted in the daughters to some extent taking sides; the younger daughter giving evidence for her father and the elder for her mother. In January, 1947, the husband had a final round table conference with his wife and daughters and complained of his wife's conduct saying that he could not stand it much longer. He eventually left the house on May 17, 1947. The commissioner granted the husband a decree on the ground of desertion and the wife appealed.

William Temple for the wife: There was here no desertion by the wife, at all events before May, 1947, when it might be contended that there was constructive desertion by the wife. Until that date, the spouses occupied the same household, sharing the same living rooms, meals and fire. Even if there were an animus deserendi on the part of the wife, there was no de facto separation of the spouses and so there cannot have been desertion on the part of the wife before the husband left the house. It has been held that there may be de facto separation, although the same roof covers the dwelling-place of both spouses, but there must be two households under that roof, although there need be no structural division of the home into flats: *Smith* v. *Smith* (1), *Wilkes* v. *Wilkes* (2) and *Shilston* v. *Shilston* (3). In *Littlewood* v. *Littlewood* (4) the facts of which may be compared with those in this case, Pilcher J. said (5): "The strongest case in which it was decided that, although the "husband and the wife continued to live under the same roof, "the facts justified the court in coming to the conclusion that "desertion was proved, is *Smith* v. *Smith* (1)." The facts in that case, then, may be described as the limit. In *Littlewood's* case (4) where the wife cooked her husband's food when she was at home and occasionally performed other domestic duties, although, otherwise, she ignored him in the home, Pilcher J. found that there was no desertion. Yet in *Wanbon* v. *Wanbon* (6) the same judge found desertion, the facts showing that the spouses lived in the same household although "the "wife had refused to cook dinner for him, make his bed, "mend his clothes or perform any wifely duty for him what-"soever." It is difficult to reconcile this finding with the fact that they lived in the same household. This is the only reported case tried by a judge of the Divorce Division, which may be said to be inconsistent with the principle which, it has been submitted, is established by the authorities.

Norman Black, *Castle-Miller* and *Miss A. F. Dixon* for the husband: This, no doubt, on the evidence is a border-line case in which the discretion of the trial judge should be supported. It is clear from the facts that were the husband ill in his bedroom, the wife would not cook his food or bring it to him. The wife performed no wifely services for him and apart from cooking the family meal, she withdrew from him as fully, as if she had left the house. This case cannot be distinguished from *Wanbon* v. *Wanbon* (6) where the spouses lived in the same

(1) [1940] P. 49.
(2) [1943] P. 41.
(3) (1945) 174 L. T. 105.
(4) [1943] P. 11.
(5) Ibid. 12.
(6) [1946] 2 All E. R. 366.

C. A.
1948

HOPES
v.
HOPES.

household. If consideration is given to the housing situation, it appears that the wife did every thing she could to remove herself from the society of her husband.

William Temple in reply referred to the judgment of Tucker L.J. in *Weatherley* v. *Weatherley* (1) when that case was in the Court of Appeal and of Willmer J. in *Scotcher* v. *Scotcher* (2).

Cur. adv. vult.

Nov. 3. BUCKNILL L.J.: The learned commissioner in his judgment pointed out that in order to justify a decree on the ground of desertion there must be an intention to end the conjugal society and such a course of conduct that the innocent party was compelled to leave the home. At the end of his judgment he said that he thought he was entitled to hold on the evidence before him that the wife since 1934 had a deliberate purpose of abandoning the conjugal society. It seems to me that the commissioner in his judgment did not distinguish between a case of actual desertion and one of constructive desertion. If the facts justified it, he might have found that the case came within the principle laid down in *Smith* v. *Smith* (3) and that the wife withdrew from cohabitation with the husband in 1934, or at any rate for three years immediately preceding the petition. On the other hand he might have found that the conduct of the wife compelled the ✓ husband to leave the matrimonial home. That in my view, would be constructive desertion. In that case the desertion would start from the time when the husband left the house, in other words, only a month before he filed his petition. Therefore, on the issue of desertion, it seems to me that the husband cannot succeed, unless he shows on the evidence that the wife physically deserted the husband for a period of three years before June 27, 1947. In my opinion the evidence does not establish such desertion.

In *Pardy* v. *Pardy* (4) Sir Wilfred Greene M.R. when considering the question whether a separation which began by being consensual could acquire the character of desertion without a previous resumption of cohabitation said: "The "word 'desertion' may describe an act or it may describe "a state. For the act of desertion both the factum of separa-"tion and the animus deserendi are required. A de facto

---

(1) (1946) 174 L. T. 346, 349.
(2) [1947] P. 1, 5.
(3) [1940] P. 49.
(4) [1939] P. 288.

"separation may take place without there being an animus "deserendi, but, if that animus supervenes, desertion will begin "from that moment, unless, of course, there is consent by the "other spouse." This passage makes it clear that in the present case there must be the factum of separation before the wife can be said to have deserted her husband. The mere fact that the wife behaved in such a way to her husband as to indicate that she wished him to leave the house is not in itself desertion. If it were so, a wife might be said to desert her husband, although she shared the same bed and board with him, but in every other respect treated him as non-existent. On the question whether there can be desertion while the parties are under the same roof, I think the most helpful case is *Smith* v. *Smith* (1). The facts in that case were that the husband and wife were living in a house of which the whole basement was occupied by the husband's mother. After the husband's and wife's final quarrel the husband left his wife's bedroom and made his home with his mother in the basement. He slept with his son on the first floor, leaving his wife in possession of the ground floor. He neither expected nor desired any services from his wife, but allowed her 1*l.* a week. The learned President sums up the position by saying that, although there was no physical separation between the basement and the ground floor, it was impossible in any real sense of the word to describe the husband as living with his wife. He therefore found that the husband had deserted the wife. It seems to me that the withdrawal of the husband to a separate part of the house distinguishes *Smith* v. *Smith* (1) from the present case, where there was no such withdrawal of the husband. The fact that he retired at times to his bedroom does not in itself make that room a separate part of the house. He and his wife and the daughters comprised one household. They shared the same living room, kitchen, stairs, passages and offices, and to say that under these circumstances the wife deserted the husband, while they were so living, is in my opinion, to give the word " desertion " a very artificial meaning. I think the conclusion to which I have come is consistent with the decisions in the following cases.

In *Jackson* v. *Jackson* (2), the husband and wife lived in the same house, but the husband refused to sleep with his wife, and on that ground the wife applied to the justices for a separation order on the ground of desertion. The justices

(1) [1930] P. 49.

(2) [1924] P. 19.

C. A.
1948

HOPES
v.
HOPES.

Bucknill L.J.

made the order, but on appeal to the Divisional Court, Duke P. said (1): " If there is abandonment by one of the spouses of " the other, that is desertion. If one of the spouses causes the " other to live separate and apart, that is desertion." The President then said: " I am not aware of any case in which it " has ever been said that desertion could be found upon " notional grounds while the parties were living together. " When one of the parties has deserted the other they are " living separate and apart." Hill J. in the same case said (2): " There may be desertion, though the husband continues to " live under the same roof with the wife, but in such case the " facts must be very strong. They must show that the husband " really causes the wife to live apart against her will, not only " sleep apart, but to live apart." Hill J. also referred to the unreported case of *Diver* v. *Diver* decided by himself, which goes the farthest in deciding that ill-treatment of one spouse by the other whilst living together in the same house may amount to desertion. When referring to his judgment in *Diver* v. *Diver*, he said (3): " It appeared that not only was he, " 'the husband,' insisting on sleeping in a separate room, but " that he never spoke to the wife, that when the wife spoke to " him he never answered her, and when she asked him why he so " treated her, he knocked her down. It does not seem to me " that in that case it was a very strong inference to draw that " he had already begun his desertion two months before he " left the house. The decree nisi which was granted in that " case may also be supported by the fact that I may have " found—I have no recollection whether I did, one way or the " other—cruelty upon the assault." I infer from this concluding remark that Hill J. was a little doubtful whether, on reconsideration the facts in *Diver's* case justified a finding " that the wife lived apart from her husband," and, therefore, deserted him. In *Weatherley* v. *Weatherley* (4) the simple issue was whether refusal of sexual intercourse could by itself amount to desertion. The House of Lords, affirming the Court of Appeal, held that it could not. In *Wilkes* v. *Wilkes* (5) the husband after saying to his wife: " This is the end," never slept with her again, and refused to share her sitting room or to have meals with her. Hodson J., held on the facts that the common home had been put an end to by the husband in

(1) [1924] P. 19, 23.
(2) Ibid. 26.
(3) Ibid. 28.
(4) [1947] A. C. 628.
(5) [1943] P. 41.

C. A.
1948

HOPES
v.
HOPES.

Bucknill L.J.

March, 1937, and he granted a decree to the wife on the ground of the husband's desertion. In *Angel* v. *Angel* (1) Lord Merriman P. in giving judgment in the Divisional Court on an issue of desertion referred to *Smith* v. *Smith* (2) and *Wilkes* v. *Wilkes* (3) and said that these cases were rightly decided as instances of what must necessarily be the rare class of case where it is possible for one spouse or the other to assert desertion in spite of the fact that the spouses are physically living in the same house. In *Shilston* v. *Shilston* (4) the husband and wife lived in the same five-roomed bungalow at all material times. After a violent quarrel the wife moved into a separate bedroom and denied the husband his marital rights. The husband kept his own rations in his own room, and the only meal he had in the bungalow was the breakfast which he cooked himself. At night he simply came home, went to his bedroom, and to bed. The wife also by letters which she wrote to her husband made it clear that she did not intend to do anything for him or have anything to do with him. On these facts Barnard J. held that the wife had deserted the husband, because there was a complete abandonment by her of all her duties as a wife. The learned judge based his judgment partly on the statement by Lord Merrivale P. in *Pulford* v. *Pulford* (5) that desertion was not from a place, but from a state of things. These remarks of Lord Merrivale P., however, were reconsidered by him in *Jackson* v. *Jackson* (6).

In *Pulford* v. *Pulford* (5) the facts were that the parties were married in 1883, and lived together for ten months, when the wife was removed to an asylum as a person of unsound mind. She was not finally discharged until 1902. In 1892 the husband removed to London and bought a business there, lived under an assumed name, and started an adulterous intercourse with another woman. He knew where his wife was after her discharge and sent her money until 1905. In 1922 the wife took out a summons against him for neglecting to maintain her. The summons was duly served on the husband, but no order was made at the hearing. A fortnight later a fresh summons was taken out charging him with desertion, and an order was made. On appeal to the Divisional Court, counsel on behalf of the husband argued that after the wife was taken to the asylum there was not any existing state of cohabitation to be determined, and he relied on Lord Penzance's dictum in *FitzGerald* v. *FitzGerald* (1) that "Desertion means abandonment, and implies an active withdrawal from a cohabitation "that exists." The President decided in *Pulford's* case that the husband had deserted his wife during the whole period (presumably from the time when he started his adulterous intercourse) because "there had been a complete renunciation "by him of every conjugal duty." Sir Henry Duke P. was reminded of his judgment in *Pulford's* case when he was considering the case of *Jackson* v. *Jackson* (2) and in his judgment he pointed out that in *Pulford's* case the parties had lived together but were at last living separate and apart, and that his observations were addressed to that question. In *Wanbon* v. *Wanbon* (3) the facts as stated by Pilcher J. in his judgment were that "more than ten years ago the wife with-"drew from the husband's bedroom, and has ever since refused "to have any marital relations with him. During this time "the wife has never addressed a word to her husband except "to find some fault with him; she has refused to cook dinner "for him, make his bed, mend his clothes, or perform any "wifely duty for him whatsoever." The learned judge on these facts, although the evidence was that the husband and wife had lived not only under the same roof but in the same household, granted the husband a decree on the ground of desertion. I must respectfully say that I find it difficult to reconcile this case with the principle laid down in the cases as to what constitutes desertion.

---

(1) [1946] 2 All E. R. 635.
(2) [1940] P. 49.
(3) [1943] P. 41.
(4) 174 L. T. 105.
(5) [1923] P. 18.
(6) [1924] P. 19, 25.

The cases to which I have referred establish that there may be desertion, although husband and wife are living in the same dwelling, if there is such a forsaking and abandonment by one spouse of the other that the court can say that the spouses were living lives separate and apart from one another. On the other hand, when husband and wife are living together, as they were in the present case, it seems that to grant a decree of divorce on the ground of conduct by the wife, which ex hypothesi did not amount to cruelty, and which did not amount to a life separate and apart from her husband, would be to introduce a new ground for divorce. In my judgment, therefore, the decision of the learned commissioner in the present case cannot stand, and the appeal must be allowed. The issue whether the wife's conduct amounted to cruelty must be

(1) (1869) L. R. 1 P. & M. 694, 697.

(2) [1924] P. 19, 25.

(3) [1946] 2 All E. R. 366.

decided, and, in my opinion, the proper course to pursue is to order a new trial on that issue of cruelty before another judge either locally or in London.

DENNING L.J.: Since the housing shortage, the innocent party in a matrimonial dispute is often forced to remain in the same house as the guilty party, because he or she has nowhere else to go or has not the means to go elsewhere. This has given rise to a number of cases where the innocent party has claimed maintenance or a divorce whilst they are both living under the same roof. The matrimonial offences of cruelty and adultery can, of course, be committed by the guilty party (and be not condoned by the innocent party) whilst they are living under the same roof; but, can the matrimonial offence of desertion be committed? One of the essential elements of desertion is the fact of separation. Can that exist whilst the parties are living under the same roof? My answer is: "Yes". The husband who shuts himself up in one or two rooms of his house, and ceases to have anything to do with his wife, is living separately and apart from her as effectively as if they were separated by the outer door of a flat. They may meet on the stairs or in the passageway, but so they might if they each had separate flats in one building. If that separation is brought about by his fault, why is that not desertion? He has forsaken and abandoned his wife as effectively as if he had gone into lodgings. The converse is equally true. If the wife ceases to have anything to do with, or for, the husband and he is left to look after himself in his own rooms, why is not that desertion? She has forsaken and abandoned him as effectively as if she had gone to live with her relatives. The judges of the Divorce Division have adopted this realistic view with complete unanimity right from the decision of Hill J. in *Diver* v. *Diver* (1) to the decision of the Divisional Court of the Probate, Divorce and Admiralty Division in *Angel* v. *Angel* (2). I find myself in agreement with all the decisions of the Divorce Division except perhaps *Wanbon* v. *Wanbon* (3) where the parties were said to be still in one household. If that means that, although living at arms length, they were still sharing the same living room, eating at the same table and sitting by the same fire, then I cannot agree with the finding of desertion. It is most important to draw a clear line between desertion, which is a ground for divorce, and gross neglect or chronic discord, which is not. That line is drawn at the point where the parties are living separately and apart. In cases where they are living under the same roof, that point is reached when they cease to be one household and become two households; or, in other words, when they are no longer residing with one another or cohabiting with one another.

---

(1) (Unreported) mentioned by Hill J. in *Jackson* v. *Jackson* [1924] P. 19.

(2) [1946] 2 All E. R. 635.

(3) [1946] 2 All E. R. 366.

There is one case, however, which I cannot fit into a consistent body of law on this subject. It is *Evans* v. *Evans* (1). There the husband had bolted the doors of the house against the wife. She re-entered through the window and afterwards lived in a different part of the house from him. The justices found that he had deserted her, a finding which was fully justified on the principle I have stated, and ordered him to pay maintenance for the wife and children. But when the wife sought to enforce the order, the Divisional Court, by a majority, held it was unenforceable because, although the husband had deserted her and was still deserting her, she was still "residing "with" him. That seems to me to be self-contradictory. How can anyone say that, at one and the same time, a wife is residing with her husband and that he has deserted her? She may be residing *at* her husband's house, but she is not residing *with* him. The puzzle does not end there. In *Thomas* v. *Thomas* (2) a husband had driven his wife out of the house and she obtained a maintenance order on the ground of his desertion. She afterwards returned to the house and occupied rooms in the house which were entirely separate from those occupied by him, a situation indistinguishable from that in *Evans* v. *Evans* (1). The Divisional Court held that she was still entitled to enforce her maintenance order because she had not resumed cohabitation with her husband. That means this, that the husband had deserted her and was still deserting her, and she was not cohabiting with him; but at one and the same time, if *Evans* v. *Evans* (1) is right, she was still residing with him. I cannot follow that. Indeed there seems no good reason why Mrs. Thomas should be able to enforce her order and Mrs. Evans should not. If Mrs. Evans, instead of getting back straight through the window, had stayed away a few nights so as to be able to say she had been "living apart" from her husband, she would apparently have been able to enforce her order just as Mrs. Thomas did; but because she

(1) [1948] 1 K. B. 175.

(2) [1948] 2 K. B. 294.

had nowhere else to go, she could not. It is impossible to suppose that the legislature intended such a result.

I think I can see how all this trouble has arisen. In *Evans* v. *Evans* (1) the Divisional Court were faced with the language used in ss. 1 and 2 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, which contained the different phrases " reside with " and " cohabit with " ; and they applied the well-known rule of construction of legal documents that, if a draftsman uses different words, he presumably intends a different meaning. But that is by no means a safe guide to Acts of Parliament as Blackburn J. pointed out in *Hadley* v. *Perks* (2). The draftsman may change the wording simply to improve the style. The simple intention of the Act of 1925 was that a maintenance order was not to be enforceable whilst husband and wife were residing with one another or cohabiting with one another, but only whilst they were living apart or living separately and apart. This distinction is conveyed by various phrases. The parties must not be " residing with " one another ; they must be " living separately and apart " or " living apart " from one another ; or they must not be " cohabiting with " one another. All these phrases mean the same thing to my mind. At least I can see no sensible distinction between them. They all express the fact of separation.

It seems also to have been assumed both in *Evans* v. *Evans* (1) and *Thomas* v. *Thomas* (3) that, before the passing of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the wife in order to get a maintenance order, had to show that she had quitted her husband's house. That was true in the case of cruelty or neglect, but not in the case of desertion. The Act of 1925 made no change in the law as to maintenance orders for desertion. In desertion, the fact of separation was always necessary, but Hill J. had previously pointed out in *Jackson* v. *Jackson* (4) that this might happen whilst the parties were living under the same roof. Before 1925, therefore, a wife in the position of Mrs. Evans could get a maintenance order for desertion and enforce it. If *Evans* v. *Evans* (1) is rightly decided, it means that the position of a deserted wife is worse since 1925 than before. I cannot think that the legislature intended such a result.

It may be said that it is unnecessary to consider *Evans* v. *Evans* (1) ; that that case is a decision as

(1) [1948] 1 K. B. 175.
(2) (1866) L. R. 1 Q. B. 444, 457.
(3) [1948] 2 K. B. 294.
(4) [1924] P. 19, 26.

to a maintenance order, not as to divorce; and that it turns on the wording of the Act of 1925 which is not in question here. I would point out, however, that desertion is desertion, whether so found by the justices or by the divorce judges, and it has the same meaning in the Summary Jurisdiction (Married Women) Act, 1895 as in the Matrimonial Causes Act, 1937. There are really only three courses open; either to say that the line of the decisions in the Divorce Division is wrong, or to say that the decision in *Evans* v. *Evans* (1) is wrong, or to say that a deserted wife cannot enforce her maintenance order. Faced with this choice, I am of opinion that *Evans* v. *Evans* (1) was wrongly decided. Not only did Croom-Johnson J. dissent from the decision of the majority of the court, but the decision has also been vigorously criticized by Professor Goodhart and Professor Gower. In my opinion, any wife in the position of Mrs. Evans is not only entitled to a maintenance order on the ground of desertion, but is also entitled to enforce it.

Relieved of *Wanbon* v. *Wanbon* (2) and *Evans* v. *Evans* (1) the law becomes consistent on this subject; and I agree with all that Bucknill L.J. has said about it, and as to the application of it to the facts of this case. I agree that the appeal should be allowed.

HARMAN J.: Cruelty not being an issue in this court, the petitioner, in order to succeed in this suit, must show that his wife deserted him for a period of three years immediately preceding June 27, 1947, when the petition was presented. In fact, the husband and wife lived under the same roof till May, 1947, and, therefore, there can have been no desertion for three years in the ordinary sense of that word. It is, however, well settled now that there can be desertion, though the same roof has covered the parties even up to the time when the petition is heard, and the learned commissioner must have found, in order to justify his decree, that this was the state of things here.

Desertion must connote, in my judgment, a real separation of one spouse from the other; there must be something more than a mere intention or design to end the conjugal society. That no doubt is the animus, but it is not the factum of desertion, and both elements are necessary, as the judgment of Lord Greene M.R. in *Buchler* v. *Buchler* (3) clearly shows. The

---

(1) [1948] 1 K. B. 175.
(2) [1946] 2 All E. R. 366.
(3) [1947] P. 25, 28.

C. A.
1948

HOPES
v.
HOPES.

Harman J.

learned commissioner accepted the evidence of the petitioner and rejected that of the respondent, and I am prepared to accept that view, though I deprecate the language of hyperbole employed in his statement that it was the respondent's intention to make the petitioner's life " a veritable hell on " earth." But whatever this phrase may mean, it does not suggest desertion to my mind, though it does suggest cruelty, on which the learned commissioner made no finding.

The degree of separation necessary to constitute desertion has been discussed in a number of cases. Of these I would wish to rely on *Smith* v. *Smith* (1), a case decided by Sir Boyd Merriman P. after a careful argument addressed to him at his request on the part of the King's Proctor. This case decided that there could be separation where the spouses lived in different parts of the same house, but it is to be noted that there was nothing else in common between them. This case is described by Pilcher J. in *Littlewood* v. *Littlewood* (2) as the strongest case on the subject ; he declined to go beyond it, and it may be taken as the high-water mark. I cannot think that the same learned judge can have intended to extend the doctrine in the later case of *Wanbon* v. *Wanbon* (3) though the report of that case makes it seem as if he did so. This was an undefended cause and is not fully reported. It may well be that the facts brought it within the limits of *Smith* v. *Smith* (1) and, if so, the decision was justified. If not, I should not be disposed to follow it. I am of opinion that the true criterion is that of *Smith* v. *Smith* (1), not, of course, that the facts must be the same, but the degree of separation, and, judged by that, the petitioner here must fail. In this case there was a family home, a common table was kept and a common life to some extent maintained, to such a degree indeed that to an outsider the position did not appear abnormal. I cannot think that in these circumstances the wife, however badly she behaved to her husband, was deserting him.

Appeal allowed.
Order for new trial on issue of cruelty.

Solicitors for the wife : *Smith and Hudson for F. A. Waller and Hamilton, Newcastle-upon-Tyne.*

Solicitors for the husband : *Francis Miller and Steele, for Dickinson, Miller & Turnbull, Newcastle-upon-Tyne.*

C. G. M.

---

(1) [1940] P. 49.
(2) [1943] P. 11.
(3) [1946] 2 All E. R. 366.

C. A.

1948

Oct. 26, 27; Nov. 29.

Bucknill and Denning L.JJ. and Hodson J.

TILLEY *v.* TILLEY.

Divorce — Evidence — Proceedings instituted in consequence of adultery—Parties and their spouses not only competent but compellable to give evidence—Condonation—Corroboration—Onus of proof—Supreme Court of Judicature (*Consolidation*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 198—*Matrimonial Causes Act*, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 57), *s.* 4.

In proceedings instituted in consequence of adultery, the parties thereto and their spouses are not only competent but compellable to give evidence in the proceedings, subject to the proviso in s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925, that they are not liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.

Condonation, by evidence of intercourse, sworn to by a respondent wife, need not, as a matter of law or practice, be corroborated.

Per DENNING L.J. But the allegation of such intercourse is so easy for a wife to make, and so difficult for a husband to refute, that common sense requires that, in the ordinary way, the wife's word upon it should not be accepted unless her evidence is corroborated in a material particular. This is, however, a proposition of good sense and not a rule of law and if the judge is nevertheless quite satisfied, on the wife's evidence alone, that intercourse has taken place, he is entitled to act on it.

On a petition for divorce by a husband on the ground of his wife's adultery with a co-respondent, against whom damages were claimed the adultery was proved and condonation since the bringing of the petition was then alleged. The wife, called by the co-respondent, testified that she had had intercourse with her husband, since that date, whilst the husband firmly denied that this was the case and adduced evidence as to its improbability.

Held that it could not be said as a matter of law or practice that the court could not act on the wife's evidence, although it was uncorroborated. The decision must ultimately depend on the relative credibility of the two spouses as witnesses, the probabilities of the case, and corroborative evidence, if any. Should the court find that the alleged intercourse had taken place, it would have to consider what it was the husband had condoned, since a husband only condones that which he knows, or ought as a reasonable man to be taken to know, at the time of the condonation. Further the court would have to consider whether there were facts which, after the date of the condonation, operated to revive the condoned adultery.

Per DENNING L.J. An intimate association as lovers between the wife and the co-respondent between the date when the spouses had parted and the date of the alleged condonation (even though no actual intercourse took place between them) of which the husband did not know or ought not as a reasonable man to have expected, would prevent condonation. Further such an association subsequent to the condonation (though no actual intercourse took place) might serve to revive the condoned adultery.

As regards the burden of proof on such an issue of condonation—

Per BUCKNILL L.J. It was clear from the decision in *Churchman* v. *Churchman* [1945] P. 44 (on connivance at adultery), that if, eventually, the evidence as to the condonation was so evenly balanced that the court could come to no definite conclusion about it, then s. 4 of the Matrimonial Causes Act, 1937, came into play, and the court not being satisfied that there had been no condonation was bound to dismiss the petition.

Per DENNING L.J. There was a provisional presumption against condonation. An attempt at reconciliation is so much favoured by the law that it does not, in itself, give rise to any presumption of condonation. But if facts were proved of sufficient cogency to raise a provisional presumption of condonation, then the petitioner, if he were wise, would take steps to displace it, seeing that the court at the end of the case had to ask itself: Has the legal burden been discharged? Am I satisfied that there has been no condonation?

APPEAL from a judgment of Mr. Commissioner Shove, at Lincoln, dismissing a husband's petition for divorce on the ground that the husband had condoned the adultery.

The husband was a signalman who married on March 23, 1940, when he was aged twenty-four and his wife eighteen. They lived at Stamford in Lincolnshire and had two children aged seven and four. The marriage was happy until 1947 when the wife went to help in the shop of Mr. Hall, the co-respondent, who was twenty years her senior. On January 30, 1948, the wife and Mr. Hall confessed to the husband that they had committed adultery and the wife said that she was expecting a baby. They then said that they were still seeing one another. She left the house next day and spent the night of January 31 at a friend's house in Stamford and on February 1 went to her sister's house at Sutton-in-Ashfield, sixty miles away, taking one child (a boy aged seven) with her and leaving the other child with the husband. On February 12, 1948, the husband brought his petition for divorce on the ground of her adultery with Mr. Hall, claiming 400*l.* damages against the co-respondent and the custody of the children. The wife did not enter an appearance or file an answer. The co-respondent entered an appearance, did not contest the charge of adultery, but did contest the issue of damages. There was no plea of condonation.

On May 6, 1948, the case came on for hearing. The wife

C. A.

1948

TILLEY
v.
TILLEY.

was in court but not represented. She had been served with a subpœna by the co-respondent. The co-respondent was represented by counsel who, when the case was called on, stated that since the date of the petition there had been condonation on March 20 and 21, 1948. The husband did not ask for an adjournment and the case was permitted by the commissioner to proceed on this issue. Evidence was given that the husband on Saturday, February 21, 1938, went from Stamford to East Kirby to stay with his parents and while there went over on the afternoons of Saturday, February 21 and Sunday, February 22 to Sutton-in-Ashfield, three and a half miles distant from East Kirby and visited his wife and seven-year-old son at her sister's house for two hours or so on each occasion. A young couple were also in the house on both afternoons and on the Sunday afternoon the wife's sister and her husband were in the house for part of the time. The husband told the wife that he anticipated, one day, restoring the home, but that he could not take her back as she was expecting a baby. The husband found in the wife's handbag letters from the co-respondent to the wife which he did not read at the time but which he took away with him. Having read them he said that he had changed his mind and was not willing to take her back. The letters showed that during the three weeks from January 31 to February 21 love letters were passing daily and sometimes twice a day between Mr. Hall and the wife; that they were speaking to each other on the telephone nearly every evening; that Mr. Hall was sending tablets and powders to her; that he was worrying about the damages he might have to pay the husband; that they both went to see Mr. Hall's solicitor on February 11; and that Mr. Hall went over to see the wife at Sutton-in-Ashfield at the week-ends of February 8 and 15.

Counsel for the co-respondent suggested to the husband in cross-examination that he had had sexual intercourse with the wife on the two afternoons, once in the bedroom and once in the kitchen. This the husband firmly denied, pointing out that there were other people in the house and that he and his wife were not alone, since their son was present.

The wife was called by the co-respondent. The commissioner warned her that she was not bound to answer any questions admitting her adultery unless she chose to do so. She said "I don't choose to do so." She gave her name and address, and was then asked: "Do you remember your husband "coming to see you and your child at Sutton-in-Ashfield ?" She said "I don't wish to answer." After a little discussion between the commissioner and counsel, she was next asked: "Has there been any sexual relation between you and your "husband since the petition was served in this case ?" She said again "I don't wish to answer." The commissioner then took a hand in the matter and, to use his own words, spoke to her "quite severely" and used "extreme pressure" on her to give evidence. His actual words to her were "Whenever a "witness appears in court, they are not entitled to refuse to "answer a question except questions of certain sorts. I shall "have to consider what steps to take." She was in tears by this time, and then the question was again put: "Has sexual "intercourse taken place between you and your husband at "Sutton-in-Ashfield since the petition was served ?" and she eventually answered "Yes."

There was evidence that after February 22, letters had passed between the wife and the co-respondent; and that on April 5 she went with the co-respondent to his solicitors and made a statement to them.

The commissioner dismissed the petition on the ground that the husband, after knowledge of her adultery, had had sexual intercourse with his wife on February 21 and 22 and had thereby condoned her offence.

The husband appealed.

J. C. Lawrence and *I. S. Warren* for the husband. The learned commissioner in this case forced the wife to give evidence. This he had no power to do, since by the terms of s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925 (1) she was only a "competent" witness. The

---

(1) By s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925, reproducing the terms of s. 3 of the Evidence Further Amendment Act, 1869: "The "parties to any proceedings instituted in consequence of adultery "and the husbands and wives "of the parties shall be competent "to give evidence in the proceedings, but no witness in any "such proceedings whether a party "or not, shall be liable to be asked "or be bound to answer any question tending to show that he or "she has been guilty of adultery, "unless he or she has already given "evidence in the same proceedings "in disproof of the alleged "adultery."

By s. 4 of the Matrimonial Causes Act, 1937: "The following section shall be substituted "for s. 178 of the principal Act" (the Supreme Court of Judicature (Consolidation) Act, 1925):

Section 178—(1.) "On a petition "for divorce it shall be the duty section does not provide that the parties to proceedings instituted in consequence of adultery and their spouses are to be both competent and compellable to give evidence in such proceedings. Yet in s. 176 (now repealed) of the same Act of Parliament it was provided that on any petition presented by a wife for divorce on the ground of the adultery and cruelty or adultery and desertion of her husband, the husband and wife shall be competent and compellable to give evidence with respect to "the cruelty or desertion." The word "com-"pellable" therefore, in s. 198 would appear to have been omitted of intention. By s. 4 of the Criminal Evidence Act, 1898: "The wife or husband of a person charged with an "offence under any enactment mentioned in the schedule to "this Act may be called as a witness either for the prosecution "or defence and without the consent of the person "charged." In *Leach* v. *R.* (1) the House of Lords held that the wife of a person charged with an offence to which the section applied was not compellable to give evidence against her husband. Although a competent witness by the terms of s. 4, she was not a compellable witness. Lord Atkinson said in that case (2): "The principle that a wife is not to be "compelled to give evidence against her husband is deep "seated in the common law of this country, and, I think, "if it is to be overturned, it must be overturned by a clear, "definite and positive enactment, not by an ambiguous one "such as the section relied on in this case." The provision in s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925, is repeated from s. 3 of the Evidence Further Amendment Act, 1869,

Phipson on Evidence (8th ed.) at pp. 445 and 451 and Taylor on Evidence (12th ed.) at p. 853 are of a contrary

---

"of the court to inquire, so far as "it reasonably can, into the facts "alleged, and whether there has "been any connivance or con-"donation on the part of the "petitioner and whether any "collusion exists between the "parties . . . . (2.) If the court "is satisfied on the evidence that "—(i.) the case for the petition "has been proved; and (ii.) where "the ground of the petition is "adultery, the petitioner has "not in any manner been "accessory to, or connived at, "or condoned the adultery . . . . "and (iii.) the petition is not "presented or prosecuted in col-"lusion with the respondent or "either of the respondents, the "court shall pronounce a decree "of divorce; but if the court is "not satisfied with respect to any "of the aforesaid matters, it shall "dismiss the petition . . . ."

(1) [1912] A. C. 305.

(2) Ibid. 311.

opinion on the ground that s. 1 of the Evidence Further Amendment Act, 1869, having repealed the exceptions contained in the Evidence Act, 1851 and the Evidence Amendment Act, 1853, placed the parties and their husbands and wives in proceedings instituted in consequence of adultery in the same position as to compellability as ordinary witnesses as was pointed out by Lopes J. in *Guardians of Nottingham* v. *Tomkinson* (1), i.e., being competent and therefore compellable. See *R.* v. *Lapworth* (2). But the observation of Lopes J. was made without hearing argument on this issue and was obiter. In the first edition of Wills on Evidence my contention is supported that in proceedings instituted in consequence of adultery, the parties and the husbands and wives of such parties, although competent, were not compellable witnesses. By s. 2 of the Evidence Act, 1851, parties were made "competent and compellable" to give evidence, but by s. 4 of that Act an exception was made in proceedings instituted in consequence of adultery. Then, by s. 1 of the Evidence Amendment Act, 1853, the spouses of parties were made "competent and compellable" to give evidence but by s. 2 of that Act an exception was made in any proceedings instituted in consequence of adultery. Then, by s. 1 of the Evidence Further Amendment Act, 1869, the exceptions in the case of proceedings instituted in consequence of adultery contained in s. 4 of the Act of 1851 and s. 2 of the Act of 1853 were repealed and by s. 3 of the Act of 1869 parties and their spouses were made "competent" to give evidence in such proceedings. The word "compellable" found in s. 1 of the Act of 1851 and in s. 1 of the Act of 1853 to which the repealed exceptions referred was omitted : it is submitted this must have been of design.

By s. 12 of the Married Women's Property Act, 1882, in any proceedings under the section a husband or wife "shall be "competent to give evidence against each other." By s. 16 of the same Act a wife is rendered liable to certain criminal proceedings by her husband. Then, by s. 1 of the Married Women's Property Act, 1884: "In any such criminal "proceeding against a husband or a wife as is authorized by "the Married Women's Property Act, 1882, the husband and "wife respectively shall be competent and admissible witnesses, "and, except when defendant, compellable to give evidence." It is plain that to render the wife a compellable witness an Act of Parliament was necessary.

(1) (1878) 4 C. P. D. 343, 350. (2) [1931] 1 K. B. 117, 121.

[DENNING L.J. Lord Merrivale P. in *Cavendish* v. *Cavendish* (1) said: "When the latest of the Evidence Acts "upon which the matter now depends was passed it was made "clear that a respondent in divorce was not a compellable "witness."]

Mrs. Tilley was a competent but not a compellable witness and the learned commissioner had no right to force her to give evidence.

Secondly, the wife stated in evidence that she had had intercourse with her husband on February 21 and 22, 1948. Of this there was no corroboration. The fact that the husband saw her with a view to reconciliation can be no corroboration. The court on the issue of condonation ought not to act upon uncorroborated evidence of one spouse alleging marital intercourse at a material date, especially if contradicted by the other spouse: *Joseph* v. *Joseph* (2). Condonation was not pleaded and the husband was surprised by the raising of the issue at the trial, when counsel gave dates in March for the alleged intercourse between husband and wife. The commissioner in these circumstances should have protected the husband by insisting on particulars of time and place being pleaded and then adjourning the trial so that the husband might obtain any evidence he could to deal with this new contention. Apparently, the commissioner attached no importance to the letters from the co-respondent to the wife written since husband and wife had parted, of which the husband obtained possession when he visited his wife at Sutton-in-Ashfield. The trial was unsatisfactory.

Peter Lewis (*S. L. Elborne* was with him) for the co-respondent. The fact that condonation is not pleaded by a respondent does not prevent the judge from investigating and adjudicating on facts which seem to show condonation where those facts transpire in the evidence of the petitioner: *Bertram* v. *Bertram* (3). Further, there is no requirement by the law that condonation alleged by a wife should be corroborated. Her reluctance to answer the question put to her suggested that she was a witness of truth and it is clear that the commissioner believed her. Section 4 of the Matrimonial Causes Act, 1937, imposes on the petitioner the burden of satisfying the court of the absence of connivance. If the court finds the evidence so evenly balanced that it cannot come to a

(1) [1926] P. 10, 15.
(2) [1915] P. 122.
(3) [1944] P. 59.

definite conclusion, then it must find that the petitioner has failed to satisfy the court that there is no connivance: *Churchman* v. *Churchman* (1). Once the issue has been raised the burden is then on the petitioner. By s. 4 the same rule must apply to condonation. In *Emanuel* v. *Emanuel* (2) Denning J. held that a suspicion of collusion will counterbalance the provisional presumption of innocence.

The commissioner gave the wife no direct order to give evidence and so did not force her to testify. If he did, he was right in doing so, by virtue of the terms of s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925. By that section the wife was competent and so compellable to give evidence. *R.* v. *Lapworth* (3). Avory J. said in that case (4): "Whatever the reason, we are satisfied that at common law "the wife was always a competent witness for the prosecution "when the charge against her husband was one of having "assaulted her. Once it is established that she is a competent "witness, it follows that she is a compellable witness." As has been stated this is the view of all the text-book writers and the view to the contrary in the first two editions of Wills on Evidence is withdrawn in the third edition. The ground is that the exceptions in proceedings instituted in consequence of adultery to parties and their spouses giving evidence, contained in the Evidence Act, 1851, and the Evidence Amendment Act, 1853, having been repealed, the position of the parties and of their spouses is that of ordinary witnesses: they are both competent and compellable to give evidence. The opinion of Lopes J. to the same effect in *Guardians of Nottingham* v. *Tomkinson* (5) has already been mentioned.

J. C. Lawrence replied.

Cur. adv. vult.

Nov. 29. BUCKNILL L.J. I have had the opportunity of reading the judgments of Denning L.J. and of Hodson J. I agree with their conclusion that the learned commissioner compelled the wife to answer the question put to her: "Has "there been any sexual relation between you and your "husband since the petition was served in this case?"

The first question which the court has to decide is whether the learned commissioner was right in exercising this compulsion. The question turns on the proper interpretation to be placed upon s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925.

---

(1) [1945] P. 44.
(2) [1946] P. 115.
(3) [1931] 1 K. B. 117.
(4) Ibid. 121.
(5) 4 C. P. D. 343, 350.

These were proceedings instituted in consequence of adultery and the witness was the wife of the petitioner, who was charging her with adultery with the co-respondent. Under these circumstances the section provides that she was competent to give evidence in the proceedings. The question is whether she was also compellable.

Under normal conditions a person who is a competent witness is also compellable. This was stated by the Court of Criminal Appeal in *R.* v. *Lapworth* (1). In that case a man was indicted for inflicting personal injury on his wife. The wife declined to give evidence against her husband, but the court held that she was a compellable witness. She was competent, because a wife had always been competent to give evidence in a criminal court against her husband that he had committed an assault upon her. Being competent, she was also compellable. Avory J. giving the judgment of the court, said : " Once it is established that she is a competent witness, " it follows that she is a compellable witness ; that is to say " that she, having made her complaint of, or independent " evidence having been given of, an assault on her by her " husband, and she having been summoned, as she may be, " she is, like all other witnesses, bound to answer any questions " put to her. In other words, she becomes a compellable " witness." There is, however, an important exception to this rule, an exception which was the basis of the decision of the House of Lords in *Leach* v. *R.* (2). In that case the wife of a man charged with the crime of incest refused to give evidence against her husband, and the House of Lords held that she could not be compelled to do so. The case turned on the interpretation of s. 4, sub-s. 1, of the Criminal Evidence Act, 1898, by which the wife of a person charged with certain scheduled offences may be called as a witness either by the prosecution or the defence and without the consent of the person charged. The question for decision was whether the wife, who was a competent witness by reason of the section, was also compellable. Sir John Simon and Mr. Rowlatt, counsel for the Crown, put forward the same argument as that which subsequently succeeded in *R.* v. *Lapworth* (1). I quote from p. 309 of the report in the Law Reports, where the argument is set out as follows: "If a person may be called, the legal "consequence is that he must submit to examination. There is "no standing rule that a wife, if competent, is not compellable "to give evidence. The Act of 1898 eschews the use of the "word 'compellable' and that controversy. The words of "the earlier statutes are 'competent but not compellable,' "not 'competent and compellable,' and where the word "'competent' is used without more the inference is that the "witness is compellable." The House of Lords, however, did not accept that argument. Earl Loreburn L.C. at the commencement of his speech said: "It is very desirable that "in a certain class of cases justice should not be thwarted by "the absence of the necessary evidence, but upon the other "hand it is a fundamental and old principle to which the "law has looked, that you ought not to compel a wife to "give evidence against her husband in matters of a criminal "kind."

---

(1) [1931] 1 K. B. 117, 121. (2) [1912] A. C. 305.

Apart from the words of the material statutes, to which I must refer, one would think that if a husband cannot be compelled to answer questions tending to show that he has committed adultery, his wife ought not to be compelled to answer questions tending to show that her husband has committed adultery. The law has always regarded, and still regards, adultery as allied to a criminal offence, as is shown by the decision of Lord Merrivale P. in *Cavendish* v. *Cavendish* (1), where the court held that an order for discovery cannot be made against a party to divorce proceedings when it is sought for no other purpose than to prove that party guilty of adultery. Lord Merrivale P. in his judgment quotes from the classic judgment of Bowen L.J. in *Redfern* v. *Redfern* (2): "It is "one of the inveterate principles of English Law that a party "cannot be compelled to discover that which, if answered, "would tend to subject him to any punishment, penalty, "forfeiture, or ecclesiastical censure. In these days, when the "thunders of the Church have become less formidable, the rule, "so far as it relates to ecclesiastical censure, seems to wear an "archaic form; but adultery is a charge of such gravity as to "render it not unnatural that we should find the doctrine still "applicable to it—that 'no one is bound to criminate "himself'." It is true that the question which the wife refused to answer in the present case was not directed to the question whether she had herself committed adultery. But if the word "competent" in s. 198 infers compulsion, then it seems to me that the wife of the co-respondent might be called by the petitioner husband, and compelled to give evidence that her husband, the co-respondent, had committed adultery. The interpretation to be placed upon this section in this case goes far beyond the particular facts of this case.

---

(1) [1926] P. 10, 13.

(2) [1891] P. 139, 147.

Section 198 repeated in practically identical terms s. 3 of the Evidence Further Amendment Act, 1869. The history of the matter is shortly this. By s. 2 of the Evidence Act, 1851, the parties to an action, with the exception contained in the fourth section, were made competent and compellable to give evidence. Section 4 of that Act was in the following terms: "Nothing herein contained shall apply to any proceeding ". . . . instituted in consequence of adultery, or to any action "for breach of promise of marriage." Section 2 of the Evidence Amendment Act, 1853, was as follows: "Nothing "herein shall render any husband competent or compellable "to give evidence for or against his wife or any wife competent or compellable to give evidence for or against her "husband in any criminal proceeding or in any proceeding "instituted in consequence of adultery." Section 1 of the Evidence Further Amendment Act, 1869, repealed s. 4 of the Evidence Act, 1851, and so much of s. 2 of the Evidence Amendment Act, 1853, as is contained in the words "or in any "proceeding instituted in consequence of adultery." Section 3 of the same Act of 1869 enacted that "the parties to any "proceeding instituted in consequence of adultery, and the "husbands and wives of such parties shall be competent "to give evidence in such proceeding." The result, therefore, of that Act, was to remove the disability of the parties or a wife or husband of a party in any proceeding instituted in consequence of adultery to give evidence and to render them competent to give evidence in such proceedings, with this protection, that the witness was not bound to answer questions tending to show that he or she has been guilty of adultery. There is no such protection in the case of a question tending to show that his or her spouse has been guilty of adultery. Having regard to the fact that s. 1 of the Evidence Amendment Act, 1853, makes the husbands and wives of the parties competent and compellable in any proceedings other than one instituted in consequence of adultery, I should have thought, if it is legitimate to speculate as to the intentions of the legislature, except as shown by the actual words of the statute, that if the legislature had intended in 1869 to make the parties and spouses of parties competent and compellable as witnesses in proceedings as to which they had been excluded as witnesses by the Acts of 1851 and 1853, the legislature would have said "competent and compellable" and not merely "competent." However, after considering the reasons contained in the judgments of Denning L.J. and Hodson J. on this point, I have reluctantly come to the conclusion that a witness who is competent by virtue of s. 198 of the Act of 1925 is also compellable.

I now have to consider what is the proper order to make on this appeal. The trial of the issue of condonation was in my opinion very unsatisfactory. In the first place, it was unsatisfactory because the co-respondent's legal advisers gave no notice to the petitioner that they intended to raise the issue of condonation until after the case had been called on, although it appears from the statement of counsel for the co-respondent to the learned commissioner at the start of the trial, that the wife had twice admitted intercourse with her husband since the filing of the petition to the co-respondent's solicitor. The managing clerk to the solicitor for the co-respondent, was also called to prove that the wife made a statement to him on April 5, and that when he served her with a subpœna on April 30 she said her statement was true. The trial took place on May 6. Having regard to the fact that the co-respondent admitted the adultery, I think it was the duty of the co-respondent's advisers to notify the petitioner in ample time before the trial that they intended to raise the issue of condonation. In the second place, when counsel for the petitioner informed the court that he proposed to raise the issue of condonation, he gave the date of the alleged intercourse as on March 20 and 21, 1948, whereas it subsequently appeared from the evidence that the alleged dates were Saturday and Sunday, February 21 and 22. In the third place, the learned commissioner on hearing that the issue of condonation was to be raised said that he supposed the proper procedure was for him to hear the evidence of the petitioner, and counsel for the co-respondent could then call the wife on the question of condonation. With great respect to the learned commissioner, I think the proper procedure would have been for the counsel for the petitioner to ask for particulars of time and place of the alleged condonation, and to have asked for an adjournment for the matter to be inquired into, after those particulars had been given. In the fourth place, I think that the learned commissioner did not apparently attach any importance to the contents of the letters to and from the co-respondent to the wife, which the husband said he obtained possession of on the 22nd February, letters which appear to me to have considerable importance on certain aspects of the issue of condonation. For these reasons, in my opinion, a serious miscarriage of justice may have taken place in this case, owing to the way in which the issue of condonation was raised and tried. I think, therefore, that this court should set aside the judgment and order a new trial. I am anxious to say nothing which should in any way seem to indicate my opinion as to where the truth lies in this difficult and obscure case, and which might in any way tend to prejudice the trial. I think the trial should take place either locally or in London before another judge.

Having regard to the arguments on points of law addressed to us on this appeal, it may possibly be helpful to the trial judge if I indicate what those points were, and some at any rate of the considerations which may properly be borne in mind with reference thereto. The first point taken was that there was no corroboration of the wife's evidence. As to that point, in my opinion where the issue is one which depends entirely on the evidence of one spouse, which is denied by the evidence of the other spouse, especially where the evidence of each is equally credible, or substantially so, the court naturally looks to see what corroboration, if any, there is of the evidence of either or both, and in the absence of any corroboration looks to see where the burden of proof lies. I think it erroneous to say that the evidence of the wife in this case alleging sexual intercourse with her husband should not be acted upon either as a matter of law or practice unless there is corroboration of her evidence. The decision in this case must ultimately depend upon the relative credibility of the spouses as witnesses, upon the probabilities of the case, and upon the corroborative evidence, if any.

As regards the burden of proof, the principle has, I think, been laid down clearly by the Court of Appeal in *Churchman* v. *Churchman* (1). That was a case of alleged connivance at adultery, an act which one would think in the ordinary course of things required a higher degree of proof than the fact of marital intercourse between husband and wife, even after a confession of adultery. Be that as it may, in *Churchman's* case (1) the judgment of the court made it clear that if at the end of the trial the evidence as to condonation is so evenly balanced that the court can come to no definite conclusion about it, then s. 4 of the Matrimonial Causes Act, 1937, comes into play, and the court, not being satisfied that there has been no condonation, is bound to dismiss the petition.

---

(1) [1945] P. 44.

The second point argued before us in this court was that the correspondence between the wife and the co-respondent, which the husband took possession of on February 22, was some evidence of adultery between the wife and the co-respondent after the confession of adultery by the wife and their written admissions on January 31, and that the alleged intercourse could not be taken as condonation of that later adultery. That is an issue which will need careful consideration at the new trial. It received no consideration at the first trial. I think that a husband only condones that which he knows, or ought, as a reasonable man to know, at the time of the condonation. It seems to me to be a question of fact in this case whether the adultery, if any, which took place after the confession, should not have been known by the husband as having taken place before he had the alleged intercourse with his wife on February 21 and 22.

DENNING L.J. Two questions are raised in this case: (1.) whether a wife is compellable to give evidence for or against her husband in proceedings instituted by him in consequence of her adultery; (2.) whether in the circumstances of this case the commissioner was right in dismissing the petition on the ground of condonation. [His Lordship having related the facts, continued:] On these facts it is quite plain that the wife was compelled to give evidence against her husband when she was unwilling to do so. The question is whether that was lawful.

The argument that it was unlawful is simple and attractive. At common law neither husband nor wife was competent or compellable to give evidence for or against the other. The relevant statutory provision which permits it in this case is s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925, which says that "The parties to any proceedings "instituted in consequence of adultery and the husbands and "wives of the parties shall be *competent* to give evidence in the "proceedings." The section does not say they are to be competent *and compellable*. It is argued that the proper inference from that omission is that, although competent, they

C. A.
1948
TILLEY
v.
TILLEY.
Denning L.J.

are not compellable. In support of the argument it is said that in criminal law where a statute has made a wife competent to give evidence against her husband, she is not compellable; *Leach* v. *R.* (1). The simplicity of the argument is, however, deceptive. It omits many relevant considerations which I will set down in historical sequence so as to show their bearing on the matter.

At common law the parties to an action and their husbands and wives were not competent to give evidence at all. This was changed by Lord Brougham's first Evidence Act in 1851 which, by s. 2, made parties competent and compellable; but made an exception in the case of criminal proceedings (s. 3) and in the case of proceedings instituted in consequence of adultery and any action for breach of promise of marriage (s. 4). The courts held that the Evidence Act, 1851, although applying to the parties themselves, did not apply to the husbands and wives of the parties. These remained by the common law incompetent to give evidence. This was changed by Lord Brougham's second Act, the Evidence Amendment Act, 1853, which, by s. 1, made the husbands and wives of parties competent and compellable, but by s. 2 made an exception in any criminal proceeding or "in any proceeding instituted in "consequence of adultery." In 1857 great changes took place in the law of husband and wife. The Matrimonial Causes Act, 1857, created divorce courts to do what no court in England had ever been able to do before, namely, to pronounce decrees of divorce, so as to permit re-marriage. The grounds of divorce allowed by that Act were almost exclusively adultery, with or without aggravating circumstances (s. 27); and the new courts had to observe the same rules of evidence as the common law courts (s. 48). In as much as nearly all proceedings under that Act were instituted "in consequence of adultery," that meant that in nearly every case neither the parties nor their husbands or wives were competent or compellable to give evidence. Some partial exceptions were made by ss. 43 and 46 of the Act of 1857 and by s. 6 of the Matrimonial Causes Act, 1859; but these sections were obscurely worded and did not meet the situation. In particular, in most cases, though not in all, the parties were not able to give evidence in support of their own case or even of their own defence. Then came the Evidence Further Amendment Act, 1869. The first thing done by that Act (s. 1) was to repeal the exceptions made in Lord

---

(1) [1912] A. C. 305.

Brougham's Acts in respect of actions for breach of promise of marriage and proceedings instituted in consequence of adultery. The second thing was to make parties to an action for breach of promise competent to give evidence (s. 2); and the third thing was to make the parties to proceedings instituted in consequence of adultery competent to give evidence (s. 3). This clearly remedied the injustice whereby they were often not able even to give evidence, but the question is whether it did more, that is, whether it made them compellable.

In order to ascertain the effect of the Act of 1869, it is necessary to consider the state of the statute book at that time. It is clear that from 1869 onwards the following sections were all in force in respect of proceedings instituted in consequence of adultery: (i.) s. 2 of the Act of 1851 which made parties competent and compellable; (ii.) s. 1 of the Act of 1853 which made the husbands and wives of parties competent and compellable; (iii.) s. 43 of the Act of 1857 which made a petitioner competent and compellable to give evidence at the instance of the court but said that he was not bound to answer any question tending to show that he had been guilty of adultery; (iv.) s. 46 of the Act of 1857 which made the parties to a matrimonial cause competent to give evidence by affidavit subject to cross-examination in open court; (v.) s. 48 of the Act of 1857 which said that the rules of evidence observed in the common law courts were to be observed in the matrimonial courts; (vi.) s. 6 of the Act of 1859 which said that on a wife's petition for divorce for adultery with cruelty, or adultery with desertion, the husband and wife should be competent and compellable to give evidence relating to the cruelty or desertion; (vii.) s. 3 of the Act of 1869 which said that the parties to any proceeding instituted in consequence of adultery and the husbands and wives of such parties should be competent to give evidence in such proceeding, but gave witnesses, including parties, a privilege from answering any question tending to show that they had been guilty of adultery.

In my opinion the result of those sections was that the parties to a suit instituted in consequence of adultery and their husbands and wives were not only competent but also compellable to give evidence, subject only to the privilege from answering questions tending to show they had been guilty of adultery. My reasons are eight in number: (i.) All the sections are expressed in affirmative terms and they are all consistent with one another. They must all therefore be given their full effect. Ever since the time of Lord Coke it has been held that where there are two consistent affirmative Acts of Parliament, each must be given its full effect. It would be contrary to accepted rules of construction to say that because s. 3 of the Act of 1869 is expressed in narrower affirmative terms than s. 2 of the Act of 1851 and s. 1 of the Act of 1853, therefore those wider affirmative sections are to have their meaning cut down. (ii.) Furthermore, if the legislature had intended that the parties and their husbands and wives were to be competent, but not compellable, it would not have repealed the exception contained in s. 4 of the Act of 1851 and s. 2 of the Act of 1853. It would have retained that exception and made an exception to the exception. That is to say, it would have omitted s. 1 of the Act of 1869, and have made both s. 2 and s. 3 run as follows: "Notwithstanding anything "contained in any Act, the parties, etc., shall be competent "to give evidence." That would have rendered the parties competent, but would have left them by common law still not compellable. As it is, by repealing the exceptions altogether, the legislature has made the wide terms of s. 2 of the Act of 1851 and s. 1 of the Act of 1853 applicable to those proceedings. This is a striking contrast to criminal proceedings, for when the legislature in 1898 made accused persons and their husbands and wives competent to give evidence, the exceptions in Lord Brougham's Acts in respect of criminal proceedings were retained and not repealed, thus leaving those persons by the common law still not compellable; *Leach* v. *R.* (1). (iii.) If s. 3 of the Act of 1869 had been a complete code in itself, there would have been much force in the contention that the parties concerned are not compellable. But I have shown that s. 3 is not a complete code in itself. The law as at that time is to be ascertained from all the unrepealed sections of the Acts, including s. 2 of the Act of 1851 and s. 1 of the Act of 1853, which now stand intact without the exception as to proceedings in consequence of adultery. (iv.) By various statute law revisions from 1892 to 1937 all the sections I have mentioned have been repealed except s. 2 of the Act of 1851, s. 1 of the Act of 1853 and s. 3 of the Act of 1869 (now s. 198 of the Act of 1925). The legislature clearly did not intend by their revisions to say that the parties who had been compellable by s. 43 of the Act of 1857 and s. 6 of the Act of 1859 were no longer compellable. Those sections were repealed because it was realized that those parties were compellable under the wider provisions of s. 2 of the Act of 1851 and s. 1 of the Act of 1853 and that the narrower provisions were no longer necessary on the statute book. (v.) The view which I have expressed is the same view as was taken by text-book writers and judges from the very time that the Act of 1869 was passed, and their opinions are entitled to great weight. Contemporanea expositio fortissima est in lege. Mr. Pitt Taylor's book on evidence is most illuminating on this point. The fifth edition published in 1868 contains an elaborate exposition of the perplexities and inconsistencies that then existed, with numerous cases that had been decided on the statutes then in force—see Art. 1220, A.–D. The sixth edition published in 1872 omits them all and treats it as obvious that since 1869 the parties and husbands and wives are competent by reason of s. 3 of the Act of 1869 and compellable by reason of Lord Brougham's Acts of 1851 and 1853, see. art. 1221. In 1878 Lopes J. in *Guardians of Nottingham* v. *Tomkinson* (1), said that the object of the Act of 1869 was to make them competent and compellable. In 1907, when Mr. Wills in his book suggested that they were not compellable, Mr. Phipson (himself a great authority on the subject) immediately took him to task in the Law Quarterly Review and said they were compellable (2), and that view has been repeated in every edition of Phipson on Evidence ever since (see the eighth edition at p. 451). (vi.) The courts themselves have acted on the view that the parties are not only competent but also compellable. They have repeatedly compelled them to answer on oath interrogatories, and their affidavits in answer are evidence in the suit (see R. S. C. Or. 31, r. 24). Thus, parties to an action for breach of promise of marriage (who, by s. 2 of the Act of 1869 are also "competent" to give evidence) have always been compelled to answer interrogatories as to the matters in issue in the action. In Chitty's King's Bench Forms there is a standard form of interrogatories for such actions; see seventeenth edition at p. 333. Furthermore, parties to proceedings instituted in consequence of adultery have always been compelled to answer interrogatories as to any matters in issue except in so far as they are covered by the privilege; see *Redfern* v. *Redfern* (3). None of these parties could have been interrogated or their answers put in evidence except on the footing that, by Lord

---

(1) [1912] A. C. 305.

(1) 4 C. P. D. 343, 350.

(2) 24 L. Q. Rev. 214.

(3) [1891] P. 139, 145–6, 149.

Brougham's Acts, they are compellable to give evidence. If they were not compellable, the interrogatories would have been disallowed. (vii.) The same view was implicitly accepted by the Court of Appeal in *Campbell* v. *Campbell* (1), where a petitioner in an adultery suit was ordered to disclose documents relating to his associations with other women, and it was left to him to claim the privilege, if it was open to him. He was thus compelled to produce evidence against himself. The case of *Cavendish* v. *Cavendish* (2) was there explained as being based on the privilege; and, so explained, it affords no support for the view that a respondent cannot be called on subpœna or is not compellable to give evidence. (viii.) If it be said that the legislature cannot have intended to compel a wife to give evidence against her husband, the answer is that, except in criminal proceedings, the legislature has shown that it does so intend. Take this very case. If the King's Proctor had intervened and alleged that the adultery had been condoned, the wife could have been compelled to give evidence as to the condonation; see *Sneyd's* case (3). Why should she not be compelled then at this stage? And it is clear that if a husband is charged with adultery in a slander action, or an action for seduction, he may be compelled to give discovery and to answer interrogatories as to it, and his wife may be compelled to give evidence against him; see *Blunt* v. *Park Lane Hotel, Ld.* (4). The reason is that, although adultery is a high moral offence, it is not a criminal offence and is not subject to any pains and penalties; see *Mordaunt* v. *Moncreiffe* (5); and there is no reason why a wife should not be compelled to give evidence against him in regard to it, just as she would in an action for fraud or assault or any other civil wrong, however reprehensible. Indeed, in the House of Lords Lord Hatherley specially referred to the Act of 1869 as being one of the many statutes which indicate that a divorce suit for adultery is a civil, not a criminal matter (6). If the view I have expressed in this case is not right, it means that the parties to a breach of promise action, and the parties to any proceedings instituted in consequence of adultery and their husbands and wives are in the same position as accused persons (and their husbands and wives) are in criminal proceedings since the Act of 1898, that is, competent but not compellable to give evidence, to answer interrogatories or to make discovery. The practice of the courts since 1869 negatives any such idea. For these reasons I am satisfied that every party to a divorce suit instituted in consequence of adultery is competent and compellable to give evidence, save only in so far as he can claim the privilege. He can be brought before the court on subpœna to give evidence and must give it so that the truth may be ascertained. If, however, questions are asked tending to show that he has been guilty of adultery, the judge will warn him that he is not bound to answer, and it is then for the witness to say whether he claims the privilege or not in respect of those questions. At this stage in the history of the law of evidence, the anomaly is not that he should be compellable to give evidence, but that he should have this privilege.

---

(1) [1940] P. 90.
(2) [1926] P. 10.
(3) (1925) 42 T. L. R. 106.
(4) [1942] 2 K. B. 253.
(5) (1874) L. R. 2 H. L. (Sc.) 374.
(6) Ibid. 394, 395.

In the present case, therefore, the wife was a competent and compellable witness and was properly served with a subpœna. She was not bound to answer any questions tending to show that she had been guilty of adultery and she was not in fact compelled to do so. She was, however, bound to answer any other relevant questions, such as those which related to the visits of her husband to Sutton-in-Ashfield. The steps taken by the judge to compel her to answer were, therefore, lawful.

The second question which arises in this case is whether the comissioner was right in dismissing the case on the ground of condonation. It was argued for the husband (1.) that there was no corroboration of the wife's evidence of sexual intercourse; (2.) that the husband did not have full knowledge of all the material facts. It was answered by the co-respondent that the evidence showed at least a suspicion of condonation which the husband had not dispelled. In the discussion of these points, much turns on the burden of proof. I therefore deal with that first.

The effect of the statute as to burden of proof has been much misunderstood. At one time it was regarded as if it raised a presumption of connivance or condonation or collusion when there was none before; but that view was negatived by this court in *Churchman* v. *Churchman* (1). That case established that there was still a provisional presumption against connivance. There were circumstances of suspicion in that case (which are set out at p. 55 of the report in the Law Reports), but they were not such as to overthrow the provisional presumption against connivance. The case shows that, in a case of connivance, it is only if the facts in evidence show, not a slight suspicion, but a reasonable suspicion amounting in effect to a provisional presumption of connivance that the burden is put upon the petitioner to disprove it. The same reasoning applies to collusion; see *Emanuel* v. *Emanuel* (1). These principles must logically apply also to condonation, because before the Act there was a presumption against condonation, just as there was against connivance and collusion. In order to be a bar condonation had to be "clearly "and distinctly proved"; see per Sir John Nicholl in *Durant* v. *Durant* (2). There is now still a presumption against condonation, but it is only a provisional presumption. It stands a petitioner in good stead unless and until facts appear in evidence sufficient to displace it, that is, facts which are strong enough to raise a reasonable suspicion amounting in effect to a provisional presumption of condonation. Such facts, of course, will be of a different quality from those necessary to raise a provisional presumption of connivance or collusion which involve moral guilt, but the facts must still be of sufficient cogency to raise a provisional presumption of condonation. Then the petitioner, if he is wise, will take steps to displace it, for the judge at the end of the case has to ask himself: Has the legal burden been discharged? Am I satisfied that there has been no condonation?

---

(1) [1945] P. 44.

The question then arises what facts are sufficient to raise a provisional presumption of condonation. An attempt at reconciliation is so much favoured by the law that it does not, in itself, give rise to any presumption of condonation. It is only when the parties continue living together or are reinstated in one household that the judge is put on inquiry to see whether there has been condonation or not (see the judgment of Lord Stowell in *Elwes* v. *Elwes* (3)). Short of that, if the parties have only met for a discussion on their affairs and have not spent the night together, there is no reason to suspect condonation. If that is all that has happened, and then the rule is invoked that one act of sexual intercourse by the husband is conclusive evidence of condonation, then the party who relies on that act must at least point to a reasonable probability of it. After all, the act itself is not condonation; it is only evidence of it, albeit conclusive evidence, and it is

(1) [1946] P. 115.

(2) (1825) 1 Hagg. Ecc. 733, 752.

(3) (1796) 1 Hagg. Cons. 269, 292.

only made conclusive because of the extreme prejudice which the wife may suffer if she has a child as the result of it. A party who relies on an act which has a conclusive effect in law (when there may have been no true reconciliation and therefore no condonation in fact) must at least point to a reasonable probability of it. Any other view would gravely prejudice any attempt at reconciliation; no husband would ever be safe in meeting his wife on any single occasion with a view to reconciliation, for it would be in her power to assert that on that occasion he had had sexual intercourse with her, and he could only answer it with his own word in denial. The allegation is so easy for a wife to make and so difficult for a husband to refute that common sense requires that in the ordinary way the wife's word upon it should not be accepted unless her evidence is corroborated in a material particular. This is the course which I have acted on in trying these cases and it is fully supported by what Sir S. Evans P. said in *Joseph* v. *Joseph* (1), and by the text books such as Rayden on Divorce (4th ed.) at p. 137. It is, however, a proposition of good sense and not a rule of law; and if the judge is nevertheless quite satisfied on the wife's evidence alone that sexual intercourse did take place, he is entitled to act on it.

Turning to the evidence in this case, I can find nothing which is capable in law of being regarded as corroboration of the wife's story. Her tears in the witness box and her reluctance to give evidence cannot be regarded as corroboration, because no one can corroborate himself. The evidence of the husband not only supplies no corroboration, but makes it all the more imperative, for he said they were never alone. He said, indeed, that he loved her still, and he did admit that he told her that for the sake of the children he anticipated one day restoring the home. That was a very praiseworthy attitude in an injured husband who was attempting a reconciliation, but it does nothing to support the suggestion that there was sexual intercourse between them. The commissioner, however, seems to have been quite satisfied on the wife's evidence alone that sexual intercourse did take place, and, if there was nothing more in the case, I doubt whether this court would have interfered because of the absence of corroboration.

Assuming, however, that there was sexual intercourse, there still will be no condonation unless the petitioner had at the time full knowledge of all the material facts relating to her

---

(1) [1915] P. 122.

C. A.
1948

TILLEY
v.
TILLEY.

Denning L.J.

adultery with the co-respondent. Now the evidence shows that on Friday, January 30, the wife and the co-respondent made confessions of adultery in which they said they were still seeing one another. On Saturday, January 31, she left her husband's house and stayed the night at a friend's house in Stamford. Then, on Sunday, February 1, she went to stay with her sister at Sutton-in-Ashfield. Three weeks later the husband went over there. That is the time at which the wife says sexual intercourse took place. The question is whether any material facts took place in those three weeks of which the husband was ignorant. He says that he did not know the contents of the letters from Mr. Hall to her (which were in her handbag) or from her to Mr. Hall (which were produced at the hearing). Those letters showed that during those three weeks, right up to the time of the husband's visit, love letters were passing daily and sometimes twice a day between Mr. Hall and the wife; that they were speaking to each other on the telephone nearly every evening; that he was sending tablets and powders to her apparently with a view to procuring her abortion; that he was worrying about the damages he might have to pay to the husband; that they both went together to see his solicitor in Peterborough on February 11; that he went over to see her at Sutton-in-Ashfield on the week-ends of February 8 and 15, that on these week-ends they had what each described as a "grand" and "glorious" time together; that he looked on her as his wife; and that she was assuring Mr. Hall of her love for him and was promising him to go back to him at Stamford as soon as he could find a bed for her.

There was, therefore, ample evidence that the wife and the co-respondent were on very intimate terms right up to the time of the husband's visit. The question is whether that was a material fact. The relationship of husband and wife is one which requires the utmost good faith to be observed by the parties, and the test of materiality is similar to that applied in other relationships of a confidential nature. Material facts are those which might reasonably be expected to weigh with a reasonable husband in deciding whether to forgive his wife for her offence. Applying this test, I think the continuance of the association here was a material fact. The circumstantial details do not matter, but the continuing intimate association does matter. It is one thing to forgive a wife for past adultery when the association is over and done with. It is quite another to forgive her when the association is still continuing.

There is little hope of any true reconciliation if a wife, whilst pleading with her husband to his face for forgiveness, still keeps seeing her lover behind his back. No man can be expected to condone his wife's adultery whilst that is going on. Even if the wife did not actually commit adultery during those three weeks (as to which I say nothing) the intimate association itself was a material fact. Such an association has been held sufficient to revive an antecedent condoned adultery ; *Winscom* v. *Winscom* (1) ; *Ridgway* v. *Ridgway* (2) ; *Beard* v. *Beard* (3) ; and to justify a husband in separating from his wife ; *Glenister* v. *Glenister* (4). It must therefore be a material fact for him to know. If it was unknown to the husband and undisclosed by the wife, it is as good a ground for setting aside the transaction as fraud itself. At least it would be so held in the case of any other confidential relationship ; and of all relationships known to the law, that of husband and wife is the most confidential.

The question therefore becomes whether the husband knew of this continuing association. Before his petition can be dismissed on this ground, the facts in evidence must at least point to some probability that he knew of it. As Sir John Nicholl said in *Durant* v. *Durant* (5) : "Knowledge and "forgiveness are not legally to be presumed." If, however, any reasonable man in the husband's position and with the information he had, would have known that the intimate association had continued right up to the time of his visit, then it may be inferred that the husband probably did know. At all events, the facts would raise a provisional presumption of knowledge sufficient to call upon the husband to displace it. That seems to have been the view of the commissioner in this case. He thought that the husband knew that the association between his wife and Mr. Hall had not ceased ; and, if there was nothing more in the case, I doubt whether this court would have interfered on the ground of want of knowledge of material facts.

There is one remaining point, however, to which the commissioner has not addressed his mind. The evidence showed that, even after the husband's visit, letters had passed between the wife and Mr. Hall ; and, moreover, that on April 5 she went with Mr. Hall to his solicitor to whom she made a statement

---

(1) (1864) 3 Sw. & Tr. 380, 383.
(2) (1881) 29 W. R. 612.
(3) [1946] P. 8, 18–19.
(4) [1945] P. 30.
(5) 1 Hagg. Ecc. 733, 752.

C. A.
1948

TILLEY
v.
TILLEY.

Denning L.J.

"sort of in revenge" against her husband which was the basis of the evidence she gave in court. Those are facts which at once raise the question: Was this intimate association still continuing even after the husband's visit? For, if it was, it would operate to revive the adultery, even if it had been condoned. The letters since the visit were not produced in court, nor did the co-respondent or the wife give evidence of the nature of the association. Indeed, if it was an intimate association, they might claim privilege from saying anything about it. It was at this point, if not before, that in my opinion a serious miscarriage of justice may have taken place. At the close of the petitioner's case there was nothing whatever to support the suggestion that there had been condonation. The wife herself did not put it forward as part of her case. The only person who raised it was the co-respondent. He did not raise it in the interests of justice or to save the marriage, but to save his own pocket. He raised it at the last moment, taking the husband's advisers by surprise, when he could have raised it a month before. It was he who had taken the wife to his own solicitors, to whom she told her story "sort of in "revenge" against her husband. It was he who saw to it that she was served with a subpœna and thus compelled to give evidence against her husband much against her will. Up till now he has succeeded. On this point of condonation, which was not pleaded, the petition has not only been dismissed, with not a penny damages against the co-respondent who has broken up the home, but the husband has been ordered to pay the co-respondent's costs. If ever there was a case where the provisional presumption against condonation should have stood the husband in good stead until it was displaced, this was the case. It is because the commissioner does not seem to have realized this, that I think this appeal should be allowed. He did not properly direct himself on the burden of proof; but this court did not see the witnesses and cannot say what the result would have been if he had properly directed himself. There must therefore be a new trial.

HODSON J. This case raises an important question on the construction of s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925. The husband's contention is that the wife, respondent to the petition, was unlawfully compelled by the learned commissioner to give evidence at the trial, she not being a compellable witness. The proceedings were instituted in consequence of adultery. At the trial, the wife was sworn as a witness, having been served with a subpœna by the co-respondent. She was not asked questions as to her adultery but was examined as follows: (The commissioner): "It is my duty to warn, and it is my duty to advise you that "you are not bound to answer any question admitting your "adultery unless you choose to do so." (Respondent): "I don't choose to do so." She was then asked her name and address, and the next question is: "Do you remember "your husband coming to see you and your child at Sutton-"in-Ashfield? (A.) I don't wish to answer. (Q.) But it is a "simple question." (The commissioner): "If she doesn't "want to answer—she's your witness." The next question was: "Has there been any sexual relation between you and "your husband since the petition was served in this case? "(A.) I don't wish to answer." (The commissioner): "I am "not sure you see, Mrs. Tilley. You are here on subpœna." (Respondent): "Yes. But that was before I said I would "attend." (The commissioner): "I know, you are here." (Respondent): "Yes, but I told Mr. Dale I wouldn't answer "this afternoon when I got here." (The commissioner): "You see, Mrs. Tilley, everyone has a right to attend a court "of law because the object in the courts of law is to ascertain "the truth and to give judgment accordingly. Whenever a "witness appears in court, they are not entitled to refuse to "answer a question, except questions of certain sorts. I have "to consider what steps to take." The next question by counsel was: "Mrs. Tilley. Just a simple question. Has "sexual intercourse taken place between you and your husband "at Sutton-in-Ashfield since your petition was served? "(A.) Yes." In the circumstances I think that, although no direct order was given to the witness by the commissioner, she was compelled to give evidence.

Was she compellable? The section uses the word "competent" and omits the words "and compellable" which appear in the same statute in an earlier section, namely, s. 176 (now repealed), the proviso to which reads as follows: "Provided that nothing in this Act shall affect the right of a "wife to present a petition for divorce on any ground on "which she might, if the Matrimonial Causes Act, 1923, had "not passed, have presented such a petition, and on any "petition presented by a wife for divorce on the ground of the "adultery and cruelty, or adultery and desertion, of her

" husband, the husband and wife shall be competent and " compellable to give evidence with respect to the cruelty or " desertion." Contrasting these sections in the same statute, it would appear that compellability to give evidence is not necessarily to be inferred from competence to do so. The same conclusion is reached by consideration of *Leach* v. *R.* (1), a decision of the House of Lords on the construction of s. 4 of the Criminal Evidence Act, 1898, which provides: " The wife " or husband of a person charged with an offence under any " enactment mentioned in the schedule to this Act may be " called as a witness either for the prosecution or defence and " without the consent of the person charged." The argument of Sir John Simon, the Solicitor-General, which was read by Bucknill L.J., was rejected by the House, and Lord Atkinson said: " The principle that a wife is not to be compelled to give " evidence against her husband is deep-seated in the common " law of this country, and I think if it is to be overturned it " must be overturned by a clear, definite, and positive enact" ment, not by an ambiguous one such as the section relied " upon in this case."

The history of the relevant legislation is as follows: The Evidence Act, 1851, ss. 2, 3 and 4, made parties to an action competent and compellable, but made exceptions in the case of criminal proceedings and proceedings instituted in consequence of adultery and actions for breach of promise of marriage. The Evidence Amendment Act, 1853, ss. 1 and 2, made the husbands and wives of parties competent and compellable in any proceedings except criminal proceedings and proceedings instituted in consequence of adultery. At the passing of the latter Act therefore the husband and wife were neither competent nor compellable to give evidence against the other in any proceedings instituted in consequence of adultery. By the Matrimonial Causes Act, 1859, s. 6, in certain cases husband and wife were made competent and compellable even though proceedings were instituted in consequence of adultery: " On any petition presented by a wife, praying " that her marriage may be dissolved by reason of her husband " having been guilty of adultery coupled with cruelty, or of " adultery coupled with desertion, the husband and wife " respectively shall be competent and compellable to give " evidence of or relating to such cruelty or desertion." This section was replaced by s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, to which I have previously referred. By the Evidence Further Amendment Act, 1869, the words " or in any proceeding instituted in consequence of " adultery " in the second section of the Evidence Amendment Act, 1853, were repealed. This repeal had the effect of bringing husband and wife in such proceedings within the general provisions of s. 1 of the Evidence Act of 1851. The Evidence Further Amendment Act, 1869, however, not only repealed the above-mentioned provision of the Act of 1853 but also dealt with the particular case of parties to any proceedings instituted in consequence of adultery, and by s. 3 made the enactment now repealed but reproduced by s. 198 of the Act of 1925.

---

(1) [1912] A. C. 305.

Parliament having therefore dealt with the particular subject-matter of parties to any proceedings instituted in consequence of adultery and their husbands and wives independently of the general provisions must, it is argued, be taken to have intended their competence and compellability as witnesses to be governed by the particular provision. Accordingly, the word " compellable " being omitted after the word " competent " in s. 198 of the Act of 1925, the parties are said not to be compellable witnesses at all in proceedings instituted in consequence of adultery. This argument has not hitherto been accepted and the principal text-book writers are unanimous in stating that husband and wife, being competent and compellable by virtue of the provisions of s. 2 of the Evidence Act, 1851, are no less compellable by reason of the existence of the provisions of s. 3 of the Act of 1869 (see Taylor on Evidence (12th ed.) at p. 853, and Phipson on Evidence (7th ed.) at p. 443 ; see also Wills on Evidence (3rd ed.) at p. 134 where the author's opinion to the contrary no longer appears). The same view was accepted by Lopes J. in *The Nottingham Guardians* v. *Tomkinson* (1). The courts have themselves hitherto acted on the view that the parties are not only competent but compellable (for example, to answer interrogatories) subject to the protection extended not only to them but to other witnesses in proceedings instituted in consequence of adultery in respect of questions tending to show adultery. In my judgment, this view is correct. Section 198 of the Supreme Court of Judicature (Consolidation) Act, 1925, is not inconsistent with s. 3 of the Evidence Act, 1851, and does not therefore necessarily operate so as to make an exception to the general rule of compellability contained therein. The pro-

(1) 4 C. P. D. 343, 350.

tection extended by the second part of s. 198 limits the compellability introduced by the earlier Act by restricting the scope of admissible questions but does not go to the extent of declaring that the witnesses (whether parties or not) are not otherwise compellable. In short, their competence is unlimited but there is a limit to their compellability. In my judgment, therefore, the husband's contention as to the supposed wrongful admission of the evidence of the wife fails.

I agree that on the issue of condonation the trial was unsatisfactory, since the petitioner was taken by surprise and I agree that there should be a new trial. I also agree that as a matter of common sense the courts are always slow to act on the uncorroborated evidence of a woman who has become separated from her husband by reason of her adultery when she seeks to establish condonation by proving that sexual intercourse has taken place between herself and her husband after he had obtained knowledge of her adultery. I do not think, however, that there can be said to be any rule to this effect. The corroboration obtainable in criminal cases is not likely to be available and unless the parties are living together the sexual act itself is not readily capable of proof even inferentially by evidence other than that of the parties themselves. Section 4 of the Matrimonial Causes Act, 1937, casts a duty on the court to satisfy itself upon the evidence inter alia whether there has been condonation on the part of the petitioner. It is true that connivance and condonation are set side by side in the section but the presumption which exists against connivance must necessarily be stronger than any presumption against condonation, since the former is a presumption of innocence and the latter is in a different category. There is nothing wrong, or indeed, improbable, in a husband condoning his wife's adultery. Although the surrounding circumstances have to be examined in each case, as well as the evidence of the parties themselves, before a conclusion is reached, it is open to the court to come to the conclusion that sexual intercourse has taken place between the parties on the evidence of the woman alone.

So far as the facts of the present case were disclosed at the hearing, it appears that there were passages in the husband's evidence dealing with his intention to restore the home in the future which tended to support the probabilities of the wife's story. As for the letters passing between the wife and the co-respondent after she left the petitioner's house and before the alleged acts of sexual intercourse, I do not think that there was anything material added to the petitioner's knowledge by them. He obtained possession of the letters from the co-respondent, according to the wife, on February 21, the day of the first alleged intercourse and, according to the husband, on the following day, although he did not read them until later. When she confessed her adultery on January 30, 1948, she said she was still seeing the co-respondent, presumably on the same terms as before, and the co-respondent made a similar confession at the same time. There is no evidence that she practised any fraud upon her husband, such as concealing her pregnancy, as in *Roberts* v. *Roberts and Temple* (1), or even the extent of the meetings. The actual number of occasions on which they had met since the date of the confession could not, in my opinion, be material in the absence of fraud.

Appeal allowed.
New trial ordered.

Solicitor for the husband: *S. C. Elphick, for Kelham & Sons, Stamford.*

Solicitors for the co-respondent: *Hiscott, Troughton & Page, for J. Hunt, Peterborough.*

C. G. M.

---

(1) (1917) 117 L. T. 157.

S. *v.* S.

1948
Dec. 4.
Hodson J.

Divorce—Custody—Application for declaration that parent unfit to have custody of child—Desirability of such declaration when applicable—Guardianship of Infants Act, 1886 (49 *&* 50 *Vict., c.* 27), *s.* 7—*Guardianship of Infants Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 45), *s.* 4.

Although a parent may no longer be entitled as of right to the custody of the children on the death of the other parent, it is nevertheless desirable in certain cases for the court to record its view that a particular parent is unfit to have the custody.

APPLICATION by a successful wife petitioner for a declaration under s. 7 of the Guardianship of Infants Act, 1886 (1). The

---

(1) Guardianship of Infants Act, 1886, s. 7: "In any case where ". . . . a decree either nisi or "absolute for divorce shall be "pronounced, the court pronouncing such decree may thereby declare the parent by reason "of whose misconduct such decree "is made to be a person unfit to "have the custody of the children "(if any) of the marriage; and, "in such case, the parent so "declared to be unfit shall not, "upon the death of the other "parent, be entitled as of right "to the custody or guardianship "of such children."

1948

S. *v.* S.

application was made immediately subsequent to judgment and though the court was cleared for consideration of the application and of other matters also concerning the children, judgment was delivered thereon in open court.

By her petition the wife had asked for a decree of divorce on the ground that her husband had treated her with cruelty, and she had alleged that he was a sexual pervert who had compelled her to submit to sexual practices of a gross and debased character. She had asked the court to exercise its discretion in her favour in respect of her own adultery. The husband by his answer had denied cruelty and had asked for a divorce on the ground of adultery. The wife by her reply had pleaded conduct conducing and connivance.

Hodson J. had held that certain of the alleged perversions had been proved to have been practised against the petitioner's will and to have caused injury, and apprehension of injury, to her health: and he had further held that the adultery alleged had been connived at by the husband, who had given his wife a licence to commit adultery, and that it had also been conduced to by the husband's conduct.

Gilbert Beyfus K.C. and *Percy Hollins* for the petitioner.

Melford Stevenson K.C. and *Victor Russell* for the respondent.

HODSON J. I pronounce a decree nisi in this case.

The other matters with which I have to deal relate to the children of whom there are three, a girl born in 1934, a girl born in 1938, and a boy born in 1942. I have been asked to make a declaration under the Guardianship of Infants Act, 1886, declaring that the father is unfit to have the custody of the children. That application is based upon the facts which I have found in my judgment and not on any other facts.

That declaration ought to be made.

It is opposed first on the ground that it should not be made without hearing other evidence which may be put forward by the husband in relation to these children. That objection is not well founded. The other evidence which he may put forward may well have a bearing on the future of these children but it would not, in my judgment, be relevant to the particular question which I have been asked to decide. It is opposed secondly on the ground that such a declaration ought not to be made in this case. I do not propose to add anything to what

I have said in my judgment in the suit, and which disposes of that objection. It is opposed thirdly on the ground that s. 7 of the Guardianship of Infants Act, 1886 is really now obsolete. I have considered that point carefully because I have felt difficulty having regard to the observations of Lord Morton in the case of *Cliff* v. *Cliff* (1). He " observed that the latter " part of s. 7 of the Act of 1886 no longer had any application " because a parent was no longer entitled to the custody of " children as of right on the death of the other parent."

Although that matter was not argued before the Court of Appeal I do not desire to shelter myself behind any statement that this observation was obiter. If I thought that Lord Morton was really dealing with the point, I should regard it as an observation which I ought to follow, but I do not think he was. Moreover he had not considered s. 4 of the Guardianship of Infants Act, 1925 (2), which deals with the position which arises on the death of a parent of an infant. That, of course, is the position which is envisaged by an application for a declaration of this kind. It is said that even if this section is not obsolete yet the making of a declaration of this kind is valueless. I am not satisfied about that. I think it is desirable in a case of this kind for a court to record the view (if it takes such a view) that a particular parent is unfit. Accordingly, I make that declaration.

With regard to the question of custody I appreciate the force of the application which the husband's counsel has made that that question should not be determined in the absence of all the material which is available, or can be made available, before these children's future is further considered. I am not intending to prejudice anything which may be done in the future ; but something must be done now, having regard to pending school holidays. Without prejudice to any order which may finally be made—I should not say finally, because no order for custody is final, but without prejudice to some more permanent order hereafter—I think it is necessary to make an interim order for custody to the wife on the material which has been produced.

---

(1) [1948] W. N. 380, 381.

(2) Guardianship of Infants Act, 1925, s. 4, sub-s. 2 : " On the " death of the mother of an " infant, the father, if surviving, " shall, subject to the provisions " of this Act, be guardian of the " infant either alone or jointly " with any guardian appointed by " the mother. When no guardian " has been appointed by the " mother or if the guardian or " guardians appointed by the " mother is or are dead or refuses " or refuse to act, the court may " if it thinks fit appoint a guardian " to act jointly with the father." (In sub-s. 1 the words " father " and " mother " are reversed — " on the death of the father . . . . " etc.").

Solicitors: *Evelyn Jones & Co., agents for Jackson & Sons, Ringwood; Vertue, Son & Churcher.*

J. B. G.

Affirmed. C.A. [1949] 2 All E.R. 34.

1948
Dec. 14.

Lord Merriman P. and Hodson J.

MACRAE *v.* MACRAE

Justices — Jurisdiction — Husband ordinarily resident in Scotland — Summary Jurisdiction (Separation and Maintenance) Acts, 1895 *to* 1925—*Summary Jurisdiction (Process) Act,* 1881 (44 & 45 *Vict., c.* 24).

If a husband is ordinarily resident in Scotland, justices have no jurisdiction to issue a summons, or to cause a summons to be served, or to make an order, on a complaint brought by his wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925.

Forsyth v. *Forsyth* [1948] P. 125 considered and followed.

It is not essential in such cases for a husband to have a Scottish domicile in addition to an ordinary residence in that country.

HUSBAND'S appeal to the Divisional Court.

The parties had lived some three years in Manchester at the home of the wife's parents. In June, 1948, the husband refused to continue living there, gave up his work, and returned to his own parents in Inverness. The wife applied for and was granted a summons in which she complained that her husband had deserted her. The summons was served on him in Inverness. On the hearing of the summons at Manchester on July 22, 1948, the City justices found the complaint proved and made a maintenance order. The husband, who had remained in Scotland, appealed, and his appeal turned solely on the question of jurisdiction.

There was no precise evidence about the appellant's domicile before the Divisional Court.

Harris Walker for the appellant.
Clifford Mortimer for the respondent.

LORD MERRIMAN P. I propose to deal with the point of jurisdiction on the basis that the husband had severed his

1948

MACRAE v. MACRAE.

Lord Merriman P.

connexion with Manchester and returned to his parents' home in Inverness. It has been argued that in the circumstances the justices had no jurisdiction to issue this summons, to have the summons served, or to make an order. It is unfortunate that the solicitor who appeared when the order was made raised no suggestion that the justices were acting without jurisdiction, though he read out the statement, or precognition, from which the absence of jurisdiction is said to be deducible. That, however, is irrelevant ; for if the justices had no jurisdiction, no acquiescence, waiver, nor consent could give it to them.

I must therefore consider the question whether there was jurisdiction. That depends upon a recent decision of the Court of Appeal in *Forsyth* v. *Forsyth* (1) which overruled a decision of this court (2). The facts were not precisely the same, and I shall have to refer shortly to a certain doubt which is raised by the difference between the facts in the two cases ; but the decision of the Court of Appeal is succinctly and correctly summarized in the head-note, which I will read :—" A wife complained to justices that her husband, " who was domiciled and resident in Scotland "—(I will refer to those words in a moment)—" had deserted her there " by remaining there after she had come to England on the " understanding that he would follow her. There was no " evidence that the husband was ever in England at any " material time. The justices' summons, issued on wife's " complaint, was served on the husband in Scotland under " the Summary Jurisdiction (Process) Act, 1881. The husband " was represented before the justices by a solicitor who objected " to their jurisdiction. The solicitor also put to the wife, " while cross-examining her, certain questions not limited to " the question of jurisdiction. Held : (1.) That since the " husband was not shown to have been in England at any " material time the justices had no jurisdiction to entertain " the wife's complaint, inasmuch as the principle enunciated " by Lord Selborne L.C., in *Berkley* v. *Thompson* (3), that " there must be a cause of action of which the tribunal could " take cognizance and also a defendant subject to its jurisdiction, remained unaffected by the combined operation of " s. 1 of the Summary Jurisdiction Act, 1848, s. 4 of the " Summary Jurisdiction (Process) Act, 1881, and s. 4 of the " Summary Jurisdiction (Married Women) Act, 1895, sub-s. 1 ;

---

(1) [1948] P. 125.

(2) [1947] W. N. 119.

(3) (1884) 10 App. Cas. 45, 49.

"(2.) that the husband's appearance before the justices by "his solicitor did not debar him from challenging their "jurisdiction on appeal, since neither that act nor any act "of the parties could confer on the justices a jurisdiction "which they did not possess."

In this case we have no precise evidence about the husband's domicile. We may assume, I think, that his domicile of origin was Scotland; we know that his parents are still alive and living in Inverness, their name and his being Macrae; but we have no evidence one way or the other whether he had acquired a domicile of choice in England. Although it is not unlikely that his domicile is Scottish, I cannot say that I am sure of it.

There remains the question of residence. Up to the date in June when he finished with Manchester and with his wife's parents in Manchester, he might well have been said to have been ordinarily resident in Manchester. But from the moment he travelled up to Inverness, after leaving his wife, all the evidence tends to show that he was ordinarily resident in Scotland. The only thing that we do not know is whether he actually got work in Inverness. This case must, therefore, be decided on the basis that at the time of the issue of this process, this man was ordinarily resident in Scotland.

The question, therefore, is whether we are or are not bound by the decision in *Forsyth* v. *Forsyth* (1). If we are, there is no more to be said about it; it will be loyally followed. But Mr. Mortimer has argued that we are not bound by it. First of all, he said that the decision appears to go much too far, that, taken literally, the decision means that if an English husband happens to be over the Border for business or other reasons for a few days or a few hours at a time which happens to coincide with the issue of the summons, the whole thing is void ab initio. I do not take that view at all. I cannot see anything in the decision which goes anywhere near that. On the contrary, one of the material facts on which that decision is based, as the head-note shows, is that there was no evidence to show that the husband had any English connexion at all. It was not even shown that he had ever been in England, and it could only be said that the offence arose partially within the jurisdiction because there was evidence that he had suggested to his wife that she should go to England, had paid her fare on the basis that he intended

(1) [1948] P. 125.

to join her there, and it was his very failure to join her in England which was the suggested desertion. There was no evidence that he had, in fact, ever been present in this country or connected with it in any other way than that.

In my opinion, the only doubt which is created by *Forsyth* v. *Forsyth* (1) is that raised by Mr. Mortimer's second argument, which is that the decision was based upon Scottish domicile, as distinct from residence or ordinary residence; and I am bound to say that, faced as we are by that argument, there is a certain difficulty in knowing precisely what was decided in that respect by *Forsyth* v. *Forsyth* (1). The Divisional Court, over which I happened to preside, said (2): "At the "hearing on September 12, 1946, the husband was repre-"sented by a solicitor, who objected to the jurisdiction on "the ground that the husband was a domiciled Scotsman, and "he relied on *M'Queen* v. *M'Queen* (3). He called no evidence "in support of this submission, and admitted that, as things "stand, the point could be put no higher than that the wife "called no evidence to show that the husband was a domiciled "Englishman. It must, I think, be taken for the purposes "of the case, that he is shown to be ordinarily resident in "Scotland."

In the Court of Appeal, the leading judgment, in the sense that it was a considered judgment which was adopted by the whole court, was delivered by Bucknill L.J., who stated the proposition thus (4): "The only point taken on behalf of the "husband before the Divisional Court, and the main point "argued before this court, was that the residence in England "of the husband as well as of the wife was a condition "precedent to the exercise by the justices of their jurisdiction." Later he says (5): "I doubt whether, in a case like the present, "it is necessary to prove that the husband was ordinarily "resident in the jurisdiction at the time when the summons "was issued, and am disposed to think that mere presence "therein is sufficient; but it is unnecessary to decide the "point because in this case not only was the husband "ordinarily resident in Scotland, but there is no evidence "that he was ever in England." I can find no reference whatever in Bucknill L.J.'s judgment to domicile. Tucker L.J., who expressed his general concurrence with that judgment, stated the issue (6) as being "the jurisdiction of

(1) [1948] P. 125.
(2) 63 T. L. R. 241.
(3) (1920) 2 Scots L. T. 405.
(4) [1948] P. 125, 133.
(5) Ibid. 136.
(6) Ibid. 131.

1948

MACRAE
v.
MACRAE.

Lord Merriman P.

"the justices to make an order against the husband under the "Summary Jurisdiction (Married Women) Act, 1895, on the "ground of desertion, he having at all material times been "resident and domiciled in Scotland and having been served "with the summons in Scotland and not having been "personally present within the jurisdiction when the summons "was issued or when the order was made." He then dealt specifically (1) with the first submission of counsel—"that "there was nothing to show that the husband was resident "or domiciled in Scotland," and at the bottom of the same page said "There was no evidence that he had ever resided "in England, and the only inference that could properly be "drawn from the evidence is that he was at all times domiciled "and resident in Scotland." This, as I have already said, differs as to domicile from Bucknill L.J.'s acceptance of the finding of the Divisional Court in this respect. Cohen L.J. agreed with both the other Lords Justices. It is, therefore, a little difficult to know whether the decision was based on domicile or ordinary residence or both, but I think that the substance of the matter is that what their Lordships were dealing with was ordinary residence in Scotland, coupled, no doubt, with the fact that there was nothing to show that the husband had ever been in England. With reference to such a case they held that there was no jurisdiction to issue a summons, and, therefore, no jurisdiction to serve it under the process provided by the statute of 1881.

In spite of this doubt about the extent to which a finding of domicile was material to the judgment in *Forsyth* v. *Forsyth* (1), it is impossible to distinguish this case. We are, therefore, bound to allow this appeal, and to say that the Manchester City justices had no jurisdiction in the circumstances to issue a summons against this Scottish husband (as I think he was at the material time), or to cause him to be served as he was, or to sit in judgment upon him. The appeal, therefore, in my opinion, must be allowed.

HODSON J.: In my opinion this case is covered by authority, the authority being the decision of the Court of Appeal in *Forsyth* v. *Forsyth* (1). This case seems to me to be clearly one in which the husband was, at the material times, ordinarily resident in Scotland, and that is the footing upon which

(1) [1948] P. 125, 136.

I want to make it quite plain that I am dealing with the matter. It has been argued that *Forsyth* v. *Forsyth* (1) may be only really conclusive in the case of a man who is not only resident but domiciled out of the jurisdiction, but I do not think that that argument can be sustained. The Divisional Court made it perfectly clear in *Forsyth* v. *Forsyth* (2) that the court was approaching the problem on the footing that the husband was ordinarily resident in Scotland, and in the Court of Appeal Bucknill L.J., who gave the only judgment on the main question of jurisdiction, dealt with the matter on the same footing. Cohen L.J. agreed with him, and Tucker L.J. said that he entirely agreed with the conclusions which Bucknill L.J. had reached and the reasoning whereby he had reached them, so that there is a clear concurrence of opinion that on the basis of residence alone the jurisdiction was ousted, and it is not really possible, therefore, to draw any conclusion or get any assistance in favour of the respondent to this appeal from Tucker L.J.'s independent conclusion that the appellant in *Forsyth* v. *Forsyth* (1) was not only resident but also domiciled in Scotland. For these reasons and the reasons which my Lord has given I think that there was no jurisdiction in the justices to make the order, and, therefore, the appeal must be allowed.

Appeal allowed.

Solicitors: *Mackrell, Ward & Knight; Pritchard, Englefield & Co., for Boote, Edgar & Co., Manchester.*

(1) [1948] P. 125. (2) [1947] W. N. 119.

J. B. G.

LAUDER *v.* LAUDER.

C. A.
1948
Nov. 18, 19, 22, 23, 24, 25.

Lord Merriman P., Singleton L.J. and Pearce J.

Divorce—Cruelty—Respondent husband's fits of depression involving prolonged sulky silence—Domineering conduct of husband—Serious emotional disturbance caused to wife—Matrimonial Causes Act, 1937 (1 *Edw.* 8, *and* 1 *Geo.* 6, *c.* 57), *s.* 2.

From a very early stage of the marriage, namely during a period of about four years, the husband had been subject to fits or moods of sulky depression, sometimes lasting for several days. During such periods he would refuse to speak to his wife even when third parties were present and his conduct in so refusing to speak to

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

her in the presence of third parties was exacerbated by the fact that his manner towards them was generally normal and even cheerful. Also throughout the married life the husband was in the habit of imposing his will upon the wife regardless of her wishes, and she would reluctantly consent to submit to such domineering treatment lest there should be a recurrence of one of his sulky moods, which she knew to be highly probable, if she refused so to consent. As a result of the husband's conduct towards her she suffered serious emotional disturbance and physical ill-health.

Held, by LORD MERRIMAN P. and PEARCE J., that the husband had been guilty of such cruelty as to entitle the wife to a decree of divorce. The principles laid down in *Russell* v. *Russell* [1897] A. C. 395 and *Moss* v. *Moss* [1916] P. 155 applied.

Per SINGLETON L.J. dissenting, the husband had not been guilty of any deliberate course of conduct calculated to injure the wife's health and the legislature in using the word "cruelty" never intended it to include the kind of conduct which had been proved.

APPEAL by a husband (respondent below) from Omerod J. who granted a decree nisi of divorce to the wife (petitioner below) on the ground of cruelty.

The parties were married on June 13, 1942. The husband was an officer in the regular army and for the greater part of the period of the marriage had been abroad except for short periods of leave which he had spent with his wife. Until the capitulation of Germany he had been on active service. In the early days of the marriage the parties were deeply in love with one another and the wife had a particularly affectionate disposition.

From a very early stage of the marriage the husband had been subject to fits or moods of depression for hours or days on end, during which he would refuse to speak to the wife and would completely ignore her even when in the presence of third parties, although his manner towards third parties was generally normal and even cheerful. Even when he was in a different mood he would habitually impose his will upon his wife and she would reluctantly consent to submit to such domineering treatment lest there should be a recurrence of one of his sulky moods, which she knew to be highly probable, if she refused to submit to him.

The husband was a sincere Roman Catholic. The wife had originally not been a Roman Catholic but she became one before the marriage. The husband had, on two occasions, persuaded her against her wishes to cycle for over a mile when she was pregnant and was not feeling well. On the first of those occasions the object of the journey was to attend early mass at eight o'clock on a Sunday morning, and on the second of those occasions the object of the journey was to attend a confirmation class in order to receive instruction before partaking of the sacrament of confirmation according to the Roman Catholic rite. On the first occasion she fainted while she was in the church, and on the second occasion she fainted in the room where the class took place. On the second occasion the priest told the husband that because of her state of health it was not desirable to ask her to attend the next confirmation class. The husband, however, ignored the priest's advice and on the next occasion when the confirmation class was to be held again tried to persuade the wife to go against her will. This time she refused to go whereupon the husband sulked for a week. The wife from then onwards never went to church again.

There was medical evidence that by September, 1946, and for some time previously she had been suffering from serious emotional disturbance and physical ill-health and Ormerod J. attributed those symptoms to the husband's conduct of which she complained.

Sir Charles Doughty K.C. and *J. G. Sheldon* for the appellant, the husband. In order that there should be cruelty it is necessary first of all that the conduct complained of must actually cause bodily hurt or injury to health or must cause a reasonable apprehension of bodily hurt or injury to health (per Lord Hershell in *Russell* v. *Russell* (1)), and, secondly, the conduct must be deliberate conduct in the sense that it is carried on with the actual intention of causing bodily hurt or injury to health, etcetera, or else was such that the spouse guilty of such conduct should be presumed to know that bodily hurt or injury to health was likely to take place.

With regard to the first essential condition all that is permissible to infer from the evidence in this case is that the wife was made unhappy because of the husband's sulky moods. Even if her life had, as alleged, become intolerable that fact in itself would not constitute cruelty (*Russell* v. *Russell* per Lord Davey (2); *Horton* v. *Horton* per Bucknill J. (3); *Buchler* v. *Buchler* per Asquith L.J. (4)).

It was on behalf of the respondent suggested that the medical

---

(1) [1897] A. C. 395, 456.

(2) Ibid. 468.

(3) [1940] P. 187, 193.

(4) [1947] P. 25.

C. A.
1948

LAUDER
v.
LAUDER.

evidence showed that the respondent wife had various nervous symptoms and that therefore it must be inferred that those symptoms were caused by the husband's moods of depression. The wife, however, had other symptoms as well as the nervous ones and those other symptoms were gynæcological in character. The gynæcological trouble was so serious that she was advised by her doctor not to become pregnant again, at any rate for the time being, and eventually she had to have a serious operation. As the husband was a devout Roman Catholic he for religious reasons considered that the use of contraceptives was wrong and the result was that after such advice was given to the wife no further marital intercourse took place between them although they habitually shared the same bed. That fact alone might have caused her nervous trouble, especially as the wife had a very affectionate disposition, but gynæcological trouble very often affects the nervous system. It follows that the judge with this important evidence before him was wrong to come to the conclusion that the wife's impaired state of health was due to the husband's sulky moods. It was mere conjecture on the judge's part. In order to establish cruelty there must be proof. There was no proof that the wife's ill-health was caused by anything the husband did.

With regard to the second condition, even if the husband's conduct caused the wife's health to be injured it is quite another matter to assert that therefore the husband intended that result to follow. In the court below great reliance was placed on the case of *Squire* v. *Squire* (1) and especially on the observations of Tucker L.J. (2), where he cited with approval what Shearman J. said in *Hadden* v. *Hadden* (2) namely, that a spouse may not have an intention to be cruel nevertheless his intentional acts might constitute cruelty. We respectfully agree that the principle laid down in that case is perfectly correct, but it is fallacious to apply it to this case. No doubt it is a principle of law that a man is presumed to intend the natural consequences of his acts, but these acts must at least be voluntary acts. We say that these fits of sulky silence were not voluntary. They were caused by the particular nervous defect from which the husband suffered. There was evidence that he suffered more or less from this defect before the war, but it is quite apparent that his service in the army during the war had aggravated the defect. He was therefore in no way responsible for his sulky moods, and therefore it was wrong to say that he should have been responsible for the possible consequence that they might cause injury to his wife. If he had intended to be cruel it would be impossible to account for the fact that he never spoke an unkind word to the wife. Not only did he never speak an unkind word to her but the evidence shows that throughout their married life while he was away on service in the army, he habitually wrote extravagantly affectionate letters to her and she, in return, wrote affectionate letters to him. We submit that these facts show that his conduct if sometimes sulky was merely pathological in character and was not voluntary or intentional in any sense of those terms, especially as it was purely negative in character and unlike the acts complained about in *Squire's* case (1) did not consist of actually doing anything. Cruelty must be intentional. That fact follows from the ordinary English connotation of that word. Evershed L.J. in *Squire* v. *Squire* (2) observed that the conduct complained of must at least satisfy the ordinary acceptance of the English words " cruel " and " cruelty." It is therefore in accordance with the meaning of the word " cruelty " to say that no one can be cruel who does not intend to be cruel, subject however to the legal doctrine that a man is presumed to intend the natural consequences of his act, for that is the ordinary English meaning of the word " cruelty." There was no such intention here, and therefore, the judge was wrong in finding that the husband had been guilty of cruelty They also referred to: *Moss* v. *Moss* (3); *Mytton* v. *Mytton* (4) and *Bethune* v. *Bethune* (5).

---

(1) Ante, p. 51.

(2) The Times, December 5, 1919.

Theodore Turner K.C. and *N. Parkes* for the wife. We submit that there was ample evidence to support the judge's finding that the husband was guilty of such cruelty as to justify a decree for divorce.

The first question for determination is—Did the husband's conduct cause ill-health to the wife? The judge has found that it did. This court is therefore merely concerned with the question whether there was reasonable evidence upon which the judge could come to such a finding. From the medical evidence it was quite apparent that the wife had been suffering from serious emotional disturbance, and moreover, that the husband's sulks and his conduct in general had a markedly prejudicial effect upon her. Dr. Mathias the psychiatrist said in evidence that such conduct would even put a considerable

---

(1) Ante p. 51

(2) Ibid. 61.

(3) [1916] P. 205.

(4) (1886) 11 P. D. 141.

(5) [1891] P. 205.

C. A.
1948
LAUDER
v.
LAUDER.

strain on a normal, healthy woman but upon a woman of the wife's mentality it would have a worse effect, so much so that she would not ultimately be able to stand it and there would eventually have been a complete breakdown. The judge accepted that evidence. It was not contradicted by any other medical evidence. This court should not therefore interfere with that finding. It was suggested by counsel for the husband that there were other reasons for the wife's ill-health. One of such suggested reasons was that the discontinuance of marital intercourse because of the advice the wife had received not to become pregnant again, would account for her nervous trouble. There was, however, no medical evidence that her nervous state of health was due to such a cause, and the judge found as a fact that the real cause of the wife's nervous trouble was the husband's conduct of sulking and also of forcing her to do things which otherwise she would not do because she feared a repetition of one of those sulks. As there was ample evidence, including the uncontradicted medical evidence to support such a finding, it is not for this court to interfere.

The other suggested reason was that the wife's gynæcological trouble was sufficient to account for her emotional disturbance. This is an entirely medical matter and the medical evidence which was accepted by the judge was that the cause of that emotional disturbance was the husband's conduct of which the wife complained.

The second question for determination is—Assuming that the husband's conduct did cause the wife's ill-health, was there sufficient intention on his part to establish legal cruelty? The recent case of *Squire* v. *Squire* (1) definitely established that even when the acts causing the ill-health to a spouse were committed as the result of illness (not amounting to insanity), the spouse committing those acts may be found guilty of cruelty, for he or she is presumed to intend the natural consequences of his or her acts. It is said here that the husband had some nervous defect which caused these sulks and, secondly, that his conduct in having these sulks was purely negative in character and that, therefore, even if they did cause ill-health to the wife, he must not be presumed to have intended such a consequence.

Squire v. *Squire* (1), however, definitely rejects such a contention. It is not suggested that the husband was insane. Therefore, he was responsible for the natural consequences of his conduct and the fact that his conduct was sometimes

(1) Ante p. 51.

C. A.
1948
—
LAUDER
v.
LAUDER.

negative in character makes no difference. His conduct, however, was not always negative in character. When third parties were present he was quite normal to them and sometimes even cheerful, but he deliberately ignored the wife. One could hardly call that negative conduct. He deliberately bullied the wife to do things which she did not want to do, knowing that she would give in to him because she rightly feared that if she did not give in he would have one of his habitual sulks. That is not negative conduct; it is the conduct of a bully. To show what length this bullying conduct went, was the incident of the confirmation class. Even after the priest had told the husband that the wife should not come to the next confirmation class because she was not well enough, the husband began his bullying conduct to force her to go, and when this time she refused, he started one of his sulks, which went on for a week. That conduct could hardly be called negative conduct.

The judge found that the husband's conduct amounted to legal cruelty. We submit that there was ample evidence to support such a finding, and, therefore, his judgment should be affirmed.

They also referred to: *Russell* v. *Russell* (1); *Moss* v. *Moss* (2); *Mytton* v. *Mytton* (3); *Bethune* v. *Bethune* (4); *Horton* v. *Horton* (5); *Buchler* v. *Buchler* (6).

Sir Charles Doughty K.C. replied.

LORD MERRIMAN P. This is a husband's appeal against a decision of Ormerod J. in which, on a wife's petition on the ground of cruelty, he pronounced a decree nisi in her favour.

The case was one of a course of conduct (not including allegations of violence) of such a character as to be calculated to injure the wife's health. It is a commonplace to say that cases of that character need, as indeed do all cases of cruelty, to be strictly proved, and strictly proved in accordance with the well-known description of cruelty to which I will refer later.

There is another principle to be kept in mind when it is sought to set aside the decision of a learned judge who for three days has seen and observed the witnesses. That principle is plainly laid down in *The Hontestroom* (7). We have so recently in this court as at present constituted, gone through

(1) [1897] A. C. 395.
(2) [1916] P. 205.
(3) 11 P. D. 141.
(4) [1891] P. 205.
(5) [1940] P. 187.
(6) [1947] P. 25.
(7) [1927] A. C. 37.

C. A.
1948

LAUDER
v.
LAUDER.

Lord
Merriman P.

the detail of Lord Sumner's speech on this matter that I do not propose to do so again at length. Lord Sumner summarized the whole matter in three propositions.

After saying (1) " the only alternative is boldly to ask oneself " which story is the more probable," and saying that speaking for himself he was a poor hand at answering that kind of question, Lord Sumner continued : " My Lords, for these " reasons, I do not propose to re-try this case, nor do I think " that the Court of Appeal should have done so. I particularly " refrain, and for this reason only, from examining and " criticizing the judgment of Scrutton L.J. in detail. The " material questions to my mind are : (1.) Does it appear from " the President's judgment that he made full judicial use of " the opportunity given to him by hearing the viva voce " evidence ? (2.) Was there evidence before him, affecting " the relative credibility of the witnesses, which would make " the exercise of his critical faculties in judging the demeanour " of the witnesses a useful and necessary operation ? (3.) Is " there any glaring improbability about the story accepted, " sufficient in itself to constitute ' a governing fact, which in " ' relation to others has created a wrong impression,' or any " specific misunderstanding or disregard of a material fact, or " any ' extreme and overwhelming pressure ' that has had the " same effect ? "

Turning to the second question, which is not the least important of the three " Was there evidence before him " affecting the relative credibility of the witnesses which " would make the exercise of his critical faculties in judging " the demeanour of the witnesses a useful and necessary " operation." I think it is desirable also that we should remind ourselves that in *Watt* (*or Thomas*) v. *Thomas* (2) not for the first time after the principle had been so firmly established in 1927 did the House of Lords think it necessary to reaffirm the importance of the principle thus established.

I do not propose to read everything that was said in *Watt* (*or Thomas*) v. *Thomas* (2), but I would refer to one passage in Lord Thankerton's speech. He also laid down three principles. He begins by saying (3) : " Where a question of fact has been " tried by a judge without a jury, and there is no question of " misdirection of himself by the judge, an appellate court which " is disposed to come to a different conclusion on the printed " evidence, should not do so unless it is satisfied that any

(1) [1927] A. C. 49.
(2) [1947] A. C. 434.
(3) Ibid. 487, 488.

"advantage enjoyed by the trial judge by reason of having "seen and heard the witnesses, could not be sufficient to explain "or justify the trial judge's conclusion." I will read, but I need not comment on his second principle: "The appellate court "may take the view that, without having seen or heard the "witnesses, it is not in a position to come to any satisfactory "conclusion on the printed evidence." Thirdly, he says: "The appellate court, either because the reasons given by the "trial judge are not satisfactory or because it unmistakably "so appears from the evidence, may be satisfied that he has not "taken proper advantage of his having seen and heard the "witnesses, and the matter will then become at large for the "appellate court." Lord Thankerton goes on: "It is "obvious that the value and importance of having seen and "heard the witnesses will vary according to the class of case, "and, it may be, the individual case in question. It will "hardly be disputed that consistorial cases form a class in "which it is generally most important to see and hear the "witnesses, and particularly the spouses themselves; and, "further, within that class, cases of alleged cruelty will afford "an even stronger example of such an advantage." He gives the reasons for saying that. "Normally the cruelty is alleged "to have occurred within the family establishment, and the "physique, temperament, standard of culture, habits of verbal "expression and of action, and the interaction between the "spouses in their daily life, cannot be adequately judged "except by seeing and hearing them in the witness box. "The law has no footrule by which to measure the personalities "of the spouses. In cases such as the present, it will be almost "invariably found that a divided household promotes partisan"ship, and it is difficult to get unbiased evidence."

I propose to approach this case with those principles in mind. It is quite clear at the outset from that statement of principle that if there is a misdirection of himself by the learned judge then the whole matter is at large, because it is no use for a trial judge to rely on his appreciation of the demeanour of the witnesses if he has misdirected himself as to the principles by which his decision should be guided.

That brings me back to where I started. This case is one of those difficult cases in which it is preeminently necessary to bear in mind the limits on the finding of cruelty imposed by the well-known case of *Russell* v. *Russell* (1). I expressly

(1) [1897] A. C. 395, 440.

C. A.
1948

LAUDER
v.
LAUDER.

Lord
Merriman P.

refrain from saying "the definition" of cruelty, because several of their Lordships went out of their way to say that it was impossible to give any exhaustive definition of cruelty, while, at the same time, in affirming the Court of Appeal, they laid down definitely and clearly the limits within which alone cruelty should be found. And, although this exact phrase does not appear in any one single speech but is, as is well known, imported from the decision of the Court of Appeal which was upheld, these limits are always given as being "conduct of such a character as to have caused danger to life, "limb or health, bodily or mental, or as to give rise to a "reasonable apprehension of such danger." That was the whole point of the case.

I am not going to multiply citations from this well-known authority, but, will cite first of all, Lord Herschell, who delivered the leading opinion in favour of the majority view, and said (1): "It was contended that it is impossible "exhaustively to define 'cruelty.' Whether this be so or not, "it is manifestly necessary to determine what elements were "treated as essential to the constitution of the sævitia or "cruelty which entitled to a divorce." After going through the cases which had been cited (2), he said: "Upon a review "of the authorities prior to the time when the Divorce Act "came into operation, I think it may confidently be asserted "that in not a single case was a divorce on the ground of cruelty "granted unless there had been bodily hurt or injury to health, "or a reasonable apprehension of one or other of these."

Lord Davey, who agreed with Lord Herschell's opinion said (3): "In my opinion the proposition for the appellant"—that was that the causing of bodily or mental pain such as was calculated to render matrimonial relations unendurable was legal cruelty—"goes far beyond anything that was laid down "by the learned judges of the ecclesiastical court before the "Divorce Act, and appears to me to be far-reaching in its "possible application. I express no opinion whether the court "ought or ought not, as a matter of policy, to give relief on that "principle. My only duty is to say whether the appellants "contention is conformable to the principles on which the "ecclesiastical courts formerly acted and gave relief. I am "constrained to say that in my opinion it is not, and I see no "reason to differ from the reasons given by the majority "of the judges in the Court of Appeal. There is no question

(1) [1897] A. C. 395, 440.
(2) Ibid. 456.
(3) Ibid. 468.

"here of personal violence, and"—I emphasize these words— "in the circumstances of the case I see no evidence of any "apprehended injury to the appellant's physical or mental "health against which he requires protection""

One can sum up that case (because it would be tedious to examine it at length), by saying that it was a case in which Lord Davey himself said that it must be admitted that it was a case of gross outrage by one person upon another, and an abominable action of a wife towards her husband. No less strong expressions were used by other noble Lords. One noble Lord described the wife's conduct as scandalous and atrocious; but there was no evidence that her conduct had caused any injury to mental health or a reasonable apprehension of such injury. It is impossible to doubt that, if that evidence which was lacking had been present, the decision, both in the Court of Appeal and the House of Lords, would have been the other way. The whole point of the case is the limit thus imposed upon what, in colloquial language, are called cases of "mental cruelty," a phrase which I admit that I abhor, but which is not a bad shorthand for the class of case we are discussing. That case explains and emphasizes the principles upon which such cases should be decided and the necessity for care and watchfulness in deciding them.

[His Lordship then read a portion of the judgment of Ormerod J. stating the facts which have been described above and then continued reading from that judgment as follows:] "It went from bad to worse until in January, 1946, when the "respondent came home from Germany, she said to him that "unless there was an improvement in his manner towards her "she just could not go on and there would have to be a separation. Then, according to her, they talked the matter over "and he agreed that he must try to do better, and for the rest "of the leave he behaved very well indeed, and, as a result, "they had a leave which was one of the happiest times they had "had together since their marriage. After that she thought that "perhaps he had got over this queer habit of silence and his "method of treating her, and was looking forward to his leave "in June, 1946. Her evidence is that in June, 1946, after a "good beginning, matters again went from bad to worse, and "for the latter part of the leave, which was a somewhat long "leave—I think it was six weeks—she says the respondent was "treating her in the old way and not speaking to her and, in "fact, ignoring her completely, and she decided after that, the

C. A.
1948
LAUDER
v.
LAUDER.
Lord Merriman P.

"promise of the January leave not having been fulfilled, and the June leave having shown that the position was just as bad as ever it was, she could go on no longer."

Having summarized the husband's point of view the learned judge said: "I have to consider these two stories, and I have to decide what is the real truth in this matter. I have to decide how far this account given by the petitioner is a true account, and as to whether or not it is exaggerated, or exaggerated to any large degree. I also have to decide whether, having regard to the view I may take on the evidence of the petitioner and the respondent, the conduct of the respondent is such as might amount to cruelty. Having considered carefully, as I have had the opportunity of considering during the last three days, the demeanour of the parties, and, having heard the evidence which has been given in very great detail by both the petitioner and the respondent, I have come to the conclusion that the respondent's conduct was of the nature described by the petitioner. I have come to the conclusion that during the whole of the married life, right up to 1946, the respondent was continually in the habit of falling into moods of depression, or tempers, or call them what you will. At any rate, moods when he refused to speak to his wife and when he ignored her, sometimes for days on end, both privately and when other people were there. That is, of course, corroborated to some extent in the correspondence, with which I do not intend at this moment to deal, but it is quite clear that both from the letters and from his evidence he admits from time to time he did suffer from these moods, and I am satisfied, having heard the evidence of the petitioner, that he suffered from them to such an extent as to make her life with him almost intolerable. It is clear too, I think, on the evidence that he knew that when he ignored her in this way it was upsetting her seriously, and the cumulative effect of this, going on through the years, was in fact having a serious effect upon her nervous and emotional stability."

The learned judge fully appreciated the necessity for the co-existence of the two essential elements to a charge of cruelty: something which could be called misconduct on the part of the husband coupled with danger actual or at least apprehended to the mental health of the petitioner.

I propose, in reviewing this matter, to begin by saying—because it will affect something I have to say later—that it is my habit in trying cases of this class to begin with the latter element first. Is there in the case evidence which justifies the trial judge, whoever he may happen to be, in holding that actual or at least threatened danger to the health, bodily or mental, of the petitioner is proved ? In this case in my opinion the evidence is all one way. It is not necessary for me to go so far as that, but I am unaware of any evidence which contradicts the evidence of the mother, the sister, and, above all, the doctors, on this point. I do not intend, therefore, to go through it in detail. It can be summarized in a sentence or two. I am not concerned to say whether it is established to my satisfaction. I am only concerned on this head, as on all the rest of the case, with whether there was material on which the learned judge could properly come to the conclusion that he did.

I am going only to refer to the fact that the mother spoke of the wife before marriage as a healthy girl and made it clear beyond doubt that by the time this marriage broke up in June, 1946, she thought her daughter's mental health had most gravely deteriorated. Her sister gave evidence to the same effect, but perhaps not quite so strongly.

Dr. Harrison, who saw her in September, 1944, made it quite clear that in connexion with one of the incidents, to which allusion must be made later, there was a real risk of a miscarriage. Dr. Higgins, who performed an operation for what were said to have been imaginary ailments in connexion with her stomach, which at any rate were partly to be accounted for by a serious prolapse of the uterus, thought so badly of her mental condition that he insisted that she should see a psychologist or a psychiatrist, and recommended her to see Dr. Mathias who gave evidence of the wife's mental demeanour. Though no one, of course, can usurp the functions of the judge in tracing cause and effect in these matters, Dr. Mathias expressed very plainly and unmistakably the opinion that her marital troubles had a great deal to do with her mental condition.

I pause here to observe that it is quite true that there is plenty of evidence that the wife was highly strung—I use that convenient phrase to summarize what has been called a nicely-balanced emotional state. But all that was known to the husband. He could not live with his wife for four years without knowing that she was highly strung, and that she was a sensitive woman. It really is no exaggeration, although it may be a crude way of expressing it, to say that just as in the case of a physical attack upon a woman you are not entitled to hit her on

C. A.

1948

LAUDER
v.
LAUDER.

Lord Merriman P.

the head with a mallet and crack her skull and then say that if she had a normally thick skull the result would not have been so serious, nor in connexion with this type of case are you allowed to say that in the case of a more thick-skinned person the course of conduct complained of might not have had so serious an effect. That, of course, is what Lord Thankerton meant by saying in *Watt* (*or Thomas*) v. *Thomas* (1), that it was so important to " measure the personalities of the individual " spouses."

I do not propose, on the question whether on the medical evidence the learned judge was right in saying that in fact the cumulative effect of the husband's conduct was " having a " serious effect upon her nervous and emotional stability," to say any more than that, in my opinion, there is abundant evidence to justify him in coming to that conclusion.

That brings me to what is the more serious element of controversy in this case, for it is said that the learned judge wholly misdirected himself on this matter. As I see it, that submission boils down to one of two ways of putting it. On the facts of this case as I see it, there can be no misdirection, unless one of two things can be said: either, that the conduct complained of is incapable in law of being cruel conduct; or else if such conduct is capable in law of being cruel conduct there was not sufficient evidence on which the learned judge could find that such conduct existed. Manifestly, if either of those propositions can be established, then the judgment is vitiated, the whole question is at large, and we are entitled to come to any conclusions that happen to appeal to us.

Let us see whether there was any such conduct. I am not going to repeat, though it is material to this point, my brief summary of *Russell* v. *Russell* (2), beyond saying that more than one of the noble Lords who dealt with that appeal were careful to point out that it was impossible to give an exhaustive catalogue of the circumstances which might amount to such conduct. I have already pointed out that had it been possible in that case, as it was not in fact, to say that the abominable, atrocious, scandalous conduct (to adopt some of the epithets that were used about the wife's conduct in that case) had the effect of creating at least a reasonable apprehension of danger to the mental health of the husband, the decision would, quite plainly, have been the other way. I mention in passing that

(1) [1947] A. C. 484.

(2) [1897] A. C. 395.

Lord Halsbury—and the fact that this is in one of the dissenting speeches is quite immaterial, because it does not touch the main point—said (1): " As no judge has ever affected to define " what cruelty is exhaustively, so no judge has, in my view, " ever affected to prescribe what individual elements would " go to make up cruelty."

Lord Merrivale said precisely the same thing of the corresponding and, indeed, the correlative, offence of desertion which as everyone knows in the case where a wife has been driven from home, is very often almost exactly co-terminous with cruelty. In *Jackson* v. *Jackson*, Lord Merrivale said (2): " If there is " abandonment by one of the spouses of the other, that is " desertion. If one of the spouses causes the other to live " separate and apart, that is desertion. I am not going to " attempt an exhaustive definition of desertion. No judge, so " far as I am aware, has sought to do so, and certainly there is " no prospect of its being successfully done." That is precisely what more than one of the noble Lords in *Russell* v. *Russell* (3) said with regard to cruelty. I do not think it is necessary to multiply instances, but words to the same effect can be found in Lord Shand's speech, and in more than one other passage.

But that is only as to the elements which may go to make up the conduct of the wrongdoer. The question of the method of approach, which I should have thought was by now established beyond the slightest possibility of doubt, is dealt with by Lord Phillimore in *Moss* v. *Moss* (4). Delivering the judgment of the Court of Appeal consisting of Lord Cozens-Hardy M.R., himself, and Sargant J., Phillimore L.J., summed up the whole matter in these words: " To use the language of Lord Davey " in *Russell* v. *Russell* (5) which is in harmony with that of " Lord Herschell, protection is given ' to the complaining spouse " ' against actual or apprehended violence, physical ill-" ' treatment, or injury to health '; while in a later passage " he explains that he refers to mental as well as physical " health. The other noble and learned Lords who formed the " majority agreed with these judgments. *Mytton* v. *Mytton* (6) " and *Bethune* v. *Bethune* (7) are useful instances of the appli" cation of this doctrine by courts of first instance. A course of " conduct creating mental distress and anxiety and thereby " injuring bodily health amounts to cruelty. This is,

(1) [1897] A. C. 424.
(2) [1924] P. 19, 23.
(3) [1897] A. C. 395.
(4) [1916] P. 155, 162.
(5) [1897] A. C. 395, 468.
(6) 11 P. D. 141.
(7) [1891] P. 205.

"I apprehend, that which the learned judge found to exist "and upon which he founded his decision."

Before passing on I think it is as well just to glance at *Mytton* v. *Mytton* (1), a decision of Butt J. The headnote reads as follows: "A persistent course of harsh, irritating conduct "unaccompanied by actual violence but carried to such a point "as to endanger the petitioner's health, and renewed after "the resumption of interrupted cohabitation, held to constitute "legal cruelty." The evidence of the petitioner as summarized was "that the cruelty, which commenced during the honey-"moon consisted of harsh and irritating language and "tyrannical conduct, which made her life intolerable and "seriously injured her health. There was no actual violence, "but he had shaken his fist in her face, saying at the same time "that being a lawyer he knew the law too well to commit actual "violence." There was interruption in cohabitation and it is quite true that, after the resumption of cohabitation, there was an instance of drunken and disorderly conduct in the course of which the servant in the house is said to have rushed from the house in terror, but that this was not necessary for the decision, except to get rid of the condonation by the resumed cohabitation, is shown quite plainly by the learned judge's saying that, even up to the time before the parting occurred, if "an application had been made to the court "similar to that now made it would have been granted." The parting came about because the husband had to go to Canada, and the learned judge relied on a letter which I think has a certain resemblance to the wife's attitude as displayed in some of the correspondence in this case. I am referring in particular to what the learned judge described as "the happiest time they "ever spent together, the leave in January, 1946." Butt J. said (2): "It is an affectionate letter, and it expresses a hope "that there is a possibility of future happiness, and it ends thus: "'Your loving wife—always—if only you would behave as "'you did in the last three or four days and renew that period "'of happiness all would be well. For the sake of those few "'days of happiness, how much I could forget'." That was a letter written at the time when if it had stood alone, unconnected with conduct occurring after his return from Canada, the learned judge said there would have been no doubt that the wife would have been entitled to a decree in spite of that letter, or, as the learned judge thought, because of it, for he described

(1) 11 P. D. 141. (2) Ibid. 143.

C. A.
1948

LAUDER
v.
LAUDER.

Lord
Merriman P.

the impression conveyed to his mind by that letter as being "that there was constant unhappiness, and one very small oasis "of happiness."

I agree that neither of these two cases, *Moss* v. *Moss* (1), or even *Mytton* v. *Mytton* (2), though it is not far removed from this case is an exact precedent. It is argued, and has been asserted repeatedly, that there is no authority for holding that sulking can amount to such conduct as can form an element in cruelty. That has, I am afraid, tempted me to do what I am very reluctant to do, but I have already referred to it in the course of the argument, namely, to refer to decisions of my own. I only do so, as I hope I shall show, with becoming humility, and simply because of this repeated assertion that there is no authority for any such proposition. I wish to repeat that I cannot pledge my recollection that I have ever decided a case which depended solely upon sulkiness; but I am prepared to say without the slightest hesitation or reservation that I have decided several cases, to put it no higher than that, in which though there may have been some element of violence, for example, which taken by itself no court would be prepared to treat seriously, or some affirmative evidence of nagging or the like, the case turned in the main on an allegation of deliberate sulking and sullen silences of the kind here described. It is said, I believe quite truly, that none of these decisions has been reported, and it so happens that none of the counsel engaged in this case appears to have been engaged in any such case. This, at any rate, I am prepared to assert, that in such cases as I have already said I always begin by stating the principle in *Russell* v. *Russell* (3), and I then go on to inquire whether or not there is evidence which satisfies me that the danger-to-health element in the charge of cruelty is satisfied; and only if that is satisfied do I then go on to deal with the course of conduct alleged. I am prepared to say categorically that on more than one of these occasions I have committed myself to the statement that I can imagine no course of conduct more calculated to be destructive of married life than persistent and deliberate sulking. Oddly enough it happens that at long last in this case we were provided with an argument which I had already noted for my judgment. Sir Charles Doughty for the ~~wife~~ said to us this morning that if this case had amounted to "sending the wife to Coventry" he could well understand the charge, but that it did not because the husband's conduct was

(1) [1916] P. 155, 162.
(2) 11 P. D. 141.
(3) [1897] A. C. 395, 465.

involuntary. I had made a note, as I say, to recall that schoolboy phrase, and to remind those of us who remember our school-days that the most dreadful punishment, I use the word deliberately, which could be inflicted on a small boy was to send him, as it was called, to Coventry. I venture to think that it requires very little imagination to understand what that meant as applied to a sensitive and, at the outset at any rate, an extremely affectionate wife, when day after day, hour after hour, minute after minute, for as much as ten days—the husband himself admitted two or three days, but the learned judge found ten days—there was a persistent refusal to hold any social intercourse, and that was emphasized by his being jolly with other people, if they happened to be there, while pointedly ignoring the wife. I confess I am simply unable to understand the argument, or I was until this morning, that this could not amount to cruelty. Of course, the argument was subject to the qualification that the husband's action was involuntary. That, to my mind, is sheer nonsense. The evidence is all one way about that, including his own admission. It can be summarized in this way: the husband himself admitted, the wife proved, and the mother proved, that when he was pulled up short by one or other of them he could behave better for at any rate a few days. There was nothing involuntary about that. No doubt his temperament must be taken into account, but it was a temperament which was not uncontrollable by himself, and many of these incidents were brought about by things for which his wife was not responsible. It is all the more a reason why he should not vent some outside vexation on his innocent wife. But there is no doubt whatever that many of these instances were brought about by the wife in this sense, and in this sense only, that she was resisting the imposition of his will upon hers in matters in which she was entitled to have a will of her own. That position is illustrated by incidents over which I do not propose to go again in detail, and, in particular, the two instances connected with the church.

It is unfortunately true that this is one of the cases in which, as Sir Charles quite rightly said, religious differences have played a considerable part; still, they entered into this marriage with their eyes open on that subject. Before I deal with those two incidents in any greater detail let me preface what I am about to say by saying that they both occurred at a time when the wife was pregnant. Nobody can sit as long as I have sat here without realizing that that is a time when special tenderness is required, and when any lack of it is more keenly felt, and rightly more keenly felt, by the woman who is bearing the child of a man she loves.

In the case of the first pregnancy which ended so tragically for both of them he insisted that she should go to early mass at a time when she was two or three months pregnant. As everyone knows that is a time when a woman, even if she is not actively suffering from morning sickness, is not feeling at her best. That is elementary. The result was that she fainted. The point is not that forcing her to go to mass was cruelty in itself, and this the learned judge fully appreciated. It is that it is an outstanding instance of the attitude of the husband to the wife that he was prepared to bend her to his will by imposing on her one of these fits of temper for a greater or lesser period, and she gave way in this and the subsequent instance because she was afraid that such a thing would result. He admits that had she not given way such a thing would have resulted. That is the point of these things. Of course, inasmuch as she went to mass she went herself; she was, so to speak, a party to going, but it is the evidence afforded by this and the other instances of the domineering attitude of the husband, which he was prepared to enforce in the way I have described, that was so significant. The fact that it was in connexion, as he himself puts it, with her soul's welfare of which he thought more than of her bodily welfare, is in my opinion no excuse. Still less is it an excuse in connexion with the second instance, that of the confirmation class. Yet, again, at the expense of another faint, at a time when she was pregnant with the second child, and was deeply anxious that there should be no such disaster over this child as there had been over the first, does he bully her for her soul's good, forsooth, into going to that class with another disastrous result, after which the priest told the husband that she ought not to go again.

It really is impossible to assert that the wife, if she has been the victim of a wrong, is the author of her own wrong. I will only refer to one piece of evidence and that is about the occasion when she first burst out in words to her husband and said she could not stand this sort of thing any more; to which his reaction was that he said: "Oh, don't say that, that is the "first time we have had a quarrel." A quarrel, forsooth! How much better for everybody it would have been if, instead of these ghastly periods of sending the wife to Coventry there had been a good blow up, and after that they had kissed

Lord Merriman P.

and been friends. To my mind to talk of this course of conduct as "moods" is an euphemism, to put it mildly. To talk of them, as both counsel for the appellant talked of them, as "merely being quiet" and as "sitting reading a "book" is a mis-use of the English language.

I am not concerned to say what I should have found in this case. I simply do not know, and I am not entitled to ask myself, because I was not there at the trial and I did not see and hear these witnesses. But this I do say that if the learned judge has properly exercised his functions and has performed his duty of taking advantage of seeing and hearing the witnesses, and has come to the conclusion that this course of conduct was proved, he could, in my opinion, give no other judgment than that which he has given. In my opinion, this appeal fails and must be dismissed.

SINGLETON L.J. The appellant, Major Francis Joseph Lauder, is an officer serving at the moment in Germany. A decree nisi was granted against him by Ormerod J. on the ground of cruelty. Such a decision against any man must be regarded as a stigma upon him, and every right thinking person would so regard it. The man against whom the decree was given is not said ever to have raised his hand to his wife, and is not said ever to have spoken an unkind word to her. As I understand the case, the whole of it at the finish rested upon moods, or fits of depression which he had and which can properly be described as "the sulks."

I wondered from an early stage whether there were reported any cases of this kind. I ventured to ask, and learned counsel on both sides undertook to look in order to see if there had been. Research was made, and, so far as I understand, none precisely like this has been found. In the course of argument my Lord said to Mr. Sheldon that he himself had decided a number of cases of this kind. I am bound to say that I think it is a matter for regret that they are not reported.

Since the Matrimonial Causes Act, 1937, it has been open to the court to grant a decree "if the respondent has since the "celebration of the marriage treated the petitioner with "cruelty." The petition in this case is based upon allegations of cruelty. Parliament has not yet said, and I hope it never will be said, that a decree must be granted because two people find it impossible to get on the one with the other, or because one does not like the other. The sole question to be considered by the learned trial judge, and I know the responsibility is his, is Is it proved in fact that there was cruelty as understood in law?

I do not propose to refer to the authorities to which my Lord has referred because it would occupy time; they have been cited before us and we have all looked at them. I do propose, however, to say a few words about some later decisions, not that they alter in any sense the general principle as stated by my Lord, but because I think they provide some help towards an examination of this case.

The case of *Horton* v. *Horton* (1) was heard by Bucknill J. The headnote to that case is as follows: ' In order to obtain " relief under the Matrimonial Causes Acts on the ground of " cruelty it is not enough for a husband to establish that his " wife's character has developed in such a way as to make it " impossible for him to live happily with her. He must prove " that she has committed wilful and unjustifiable acts inflicting " pain and misery upon him and causing him injury to health. " Where a husband petitioned for divorce on the ground of " cruelty, it was held that his health was injured not merely " by the development and manifestation of the wife's " character acting in its own sphere, but by her wilful and " unjustifiable conduct to him which was an intrusion upon " and did violence to his own mode of living. That course of " conduct amounted to legal cruelty."

The learned judge said (2): " When *Russell* v. *Russell* (3) " was decided, the remedy for cruelty was a legal separation. " It cannot be supposed that a wider or more liberal meaning " should be attached to the word cruelty, now that it is a " ground for divorce. The question for me, therefore, is " whether I am satisfied on the evidence that the wife has " committed wilful and unjustifiable acts, inflicting pain and " misery upon her husband, which have caused him bodily " hurt or injury to his health, or have caused him reasonable " apprehension of such hurt or injury. Mere conduct which " causes injury to health is not enough. A man takes the woman " for his wife for better, for worse. If he marries a wife whose " character develops in such a way as to make it impossible " for him to live happily with her, I do not think he establishes " cruelty merely because he finds life with her is impossible. " He must prove that she has committed wilful and unjusti-

---

(1) [1940] P. 187.
(2) Ibid. 193.
(3) [1897] A. C. 395.

C. A.

1948

LAUDER
v.
LAUDER.

Singleton L.J.

"fiable acts inflicting pain and misery upon him and causing "him injury to health."

More recently in the case of *Squire* v. *Squire* (1) the Court of Appeal decided that "The principle that a person must "be presumed to intend the natural and probable consequences "of his or her acts is applicable to acts alleged to amount "to cruelty in matrimonial causes. It is not necessary, "therefore, to constitute cruelty that conduct complained of "should have proceeded from malignity or an intention to "harm the complaining spouse . . . ." Tucker L.J., having cited with approval the words of Shearman J. in *Hadden* v. *Hadden* (2) said (3): "I must not, however, be understood to "suggest that, in considering whether or not a case of cruelty "has been established, the state of health of the parties is not "a relevant matter to be taken into consideration together with "all the other surrounding circumstances of the case or that the "same weight is to be attached to every act whether committed "in sickness or in health, or that it is not the duty of each "spouse to care for and tend and show forbearance towards the "other in case of illness." Evershed L.J. said (4): "I do not "say that proof of such an intention (that is to say, a spiteful "or malignant intention) may not be an important, or, in some "cases, even an essential consideration . . . ." and later in his judgment the Lord Justice added: "I do not attempt "any definition of the words 'cruel' or 'cruelty' save to "say that the conduct complained of must at least satisfy "the ordinary acceptation of those English words, and that, "on well-settled authority, it must be such as to have injured, "in fact, the complainant's mental or physical health or be "such as to cause real apprehension of such injury."

I refer to one other authority, also in the Court of Appeal, the case of *Buchler* v. *Buchler* (5) in which Asquith L.J. said (6): "As to the second head of complaint the husband cannot be "absolved from neglect and want of consideration for his wife. "But this is a charge which thousands of spouses could prefer "against each other with abundant justification; but without "any hope or prospect of securing legal relief as to the ground "of constructive desertion or otherwise. It may, no doubt, "be galling—or, in some sense of the word, humiliating—

---

(1) Ante p. 51.

(2) The Times, December 5, 1919.

(3) Ante p. 58.

(4) Ante p. 60.

(5) [1947] P. 25

(6) Ibid. 47.

"for a wife to find that the husband prefers the company of his "men friends, his club, his newspaper, his games, his hobbies, "or indeed, his own society, to association with her, and a "husband may have similar grievances regarding his wife. "But this is what may be called the reasonable wear and tear "of married life, and if it were a ground for divorce, a heavy "toll would be levied on the institution of matrimony."

In approaching the case it is right to bear in mind the position of both parties. The husband had fits of depression; most annoying, most disturbing and most upsetting. There are people in this world who will sulk however much they may try to stop it. The evidence shows that he, and his wife, tried together to get him out of that state and to some extent they succeeded, particularly during his leave in January, 1946. They both recognized that; sometimes when he was spoken to about it, he said: "I am sorry, I will try to do better," and sometimes he did improve. It so happened that the happiest time they spent together, according to the evidence, was that leave in January, 1946.

Their life had been a little troubled. He had been on service all the time. He was a regular soldier. He had had service in India for some nine or ten years prior to the world war; he was in France for a period, and was evacuated from Dunkirk. Later he was in West Africa.

There has been some kind of suggestion that his condition might have been caused by or made worse by his service, but that was not proved. At one time, indeed, there was some discussion about it being inherited from his ancestors. I do not know anything about that, but what we all know is that this man did have those fits of depression which he and his wife tried to correct and clear.

Other matters of importance must be considered. He is a Roman Catholic; she was not a Roman Catholic before they were engaged to be married, but she wished to marry him and she changed her religion and became a Roman Catholic. According to his views he could not have married her unless she became a Roman Catholic. There were two incidents in regard to church or church-going, and after September, 1944, she never went to church. That I should think probably hurt his feelings; I should think so. I have read a good many parts of this transcript of the evidence more than once. I do not find anywhere any complaint by him or any unkind word on his part. Importance is attached on behalf of the petitioner to the two incidents in regard to the church. It is said that he was domineering or tyrannical, that when she was carrying her first child and was about two months advanced in pregnancy he persuaded her to go to church, or insisted that she should go to church. I find it difficult to see that it is either tyrannical or domineering if a man asks his wife to go to eight o'clock service in the morning. It may be that if she says " I do not feel very well," he ought to say " Stay in bed " by all means," especially if she is in the early stages of pregnancy. It may show lack of consideration but I cannot regard it as either tyrannical or overbearing in any sense of the word.

As to the incident of September, 1944, when it is said he insisted on her going to the confirmation class, this is her account : " When your husband said he had arranged for you " to go to the confirmation class on Tuesday, what did you say ? " (A.) I was very upset about it, and I said I would far rather " not go because I did not feel fit enough. He told me I must " go and he wanted me to go. In the end I went, because if I " did not he would not speak to me. After I had been in " there for about half an hour I just fainted under the table " and came round screaming. The priest brought me home " and told my husband that I was not to go on Thursday " unless I felt very much better."

From that time onwards, if I understand the position aright, she never went to church again. It is not suggested at all that he said that she should go, but this woman, who, after all, was twenty-seven years old at the time of her marriage and had become a Roman Catholic ceased to attend any further services. I cannot help feeling that that would have some effect upon the likelihood of the marriage lasting.

The wife had been a strong girl, so her mother said : indeed, she had taken part in motor-cycle races ; that had been her hobby. She did not get married until she was twenty-seven years of age. She had at that time been serving in the WAAF and she left that force insome what peculiar circumstances. She had made complaints with regard to her eyes; there was some difficulty in discovering what the trouble was ; later his father found something which gave her some relief. She had trouble with regard to her legs; she complained of pains in her legs and went about with her legs bandaged up. No one could find any cause for it at all. Apparently his father, who was a doctor and a Lieutenant-Colonel in the Royal Army Medical

Corps, tried to persuade her not to go about with her legs bandaged up, but she continued to do so, and went about with a shooting stick and on one occasion she slipped because the stick moved from under her. At a later stage she wrote to her husband about pains in her stomach and he thought apparently they were the same pains as the leg pains, and the letter, to which I shall refer, shows she took his remarks somewhat amiss.

There are two or three matters to which, in my view, more importance should have been attached in this case. The religious question is one. Another is the fact that since approximately November, 1944, there was none of the ordinary sexual intercourse between husband and wife; that was because she on the one hand did not feel strong enough to have another child, and he would not be a party to the use of preventatives.

When this petition was launched certain charges were made and particulars were asked for and particulars were given. The charges which were made in the petition in support of the charge of cruelty were first of all that the respondent was a man of tyrannical disposition and had continually sought to force the petitioner to submit always to his wishes by threat of persistently and ostentatiously ignoring her in private and public, and had, in fact, frequently so ignored her for considerable periods thereby causing her great anguish and injuring her health. For myself, I see no evidence that he was either tyrannical or domineering in disposition.

Then there are allegations as to ignoring her and two allegations, one as to church and the other as to the confirmation class, that he forced her in the first to cycle one and a half miles to church. I do not think the evidence supports that.

Paragraph 12 is: "That on a date in September, 1944, "near Plymouth in the county of Devon aforesaid, the "respondent tried to force the petitioner to walk through a "herd of cows in which a bull was running loose, and on her "showing that she was afraid to do so, he left her to walk "home by a detour for half a mile unaided. The petitioner "was pregnant and her legs were in a bad condition and she "became very exhausted as a result." That is September, 1944, and the child was born, I think, in April, 1945. I regard that conduct of his as silly, foolish, inconsiderate. When he had seen that she did not want to walk through the field in which there was a bull he might well have walked round

C. A.
1948

LAUDER
v.
LAUDER.

Singleton L.J.

the other way with her. Apparently he knew from the farmer there was nothing to be afraid of, but she went the other way round. I do not regard it as cruelty. Neither do I think that the learned judge regarded it as cruelty.

Another allegation in the petition is that he compelled her to walk for the space of an entire afternoon in December, 1944, looking for the fuel office. Again, there was no need for her to go. It was silly of him to take her on that walk, but I do not think it can be put higher than that myself, even though she was some six months or so advanced in pregnancy at the time.

I come now to the further and better particulars which were delivered in reply to the request by the husband. There are two observations I would make in regard to them. The first is that they were delivered on December 29, 1947—about eighteen months after the parties had last lived together—secondly, that, as to the material ones, I appreciate the fact that Ormerod J. said he disregarded them. I do not think he was right in disregarding them. They were serious allegations; the judge found that they were not proved. They never ought to have been made.

As I said earlier, the husband and wife had been extraordinarily happy during his leave in January, 1946, which lasted for some three weeks. At the commencement of that leave they had had a discussion and he had determined to conquer his moods, if he could, and apparently he succeeded, because they were happy together. After that leave an affectionate correspondence passed until there came a time in April, 1946, when the wife wrote a letter to her husband who was in Germany. It was not so happy as some others had been. Then, on April 16, she wrote: " Have had queer " tummy ache for about three weeks rather like the pain I had " after Susie came which I think may be caused by cycling." He preserved her letters, but there are not many of his until considerably later on.

On April 29, 1946, she wrote him a letter which is a little difficult to follow: " Its 7.20 again and your two letters of the " 25th and 26th have arrived. Thank you so much for them. " Am I mad or are you, practically everything I tell you now " you put the wrong construction on it. First the court case " and now me. Would you please send back the letter in which " the court case and also the one where I mentioned to you " about my latest trouble. It's not my legs—it's my tummy

C. A.
1948
LAUDER
v.
LAUDER.
Singleton L.J.

" and it is serious because, although I'm not in bed I'm only " able to hobble about. I can't be in bed because I have just " got to look after Anita. Mummy has borne the brunt of all " my trouble since our marriage, the death of our first baby, " my miscarriage, trouble at Sevenoaks being the biggest and " now this." It is a long letter and there occurs later this passage: " each time until the last leave you continued such " mental cruelty." I do not read all of it, but I draw attention to it. The letter was wholly different to that which had gone before.

On May 2, 1946, he replied: " My very own dearest darling, " Thank you very much for your letter which arrived three " hours ago." Later in the letter he says: " I hope you have " received the court case letter by now. Incidentally, I am " using office time to write this, but it is essential to do so to " try and put matters right while I hope I can still think clearly. " As you I hope realize by now, I am aware that it is tummy " that requires an operation and that I am terribly distressed " about it." Later on he says: " It will also be my earnest " endeavour to help you to forget your past life with me and " to care for you in every way. I realize that my love for you " was jealously selfish, but I am certain that it is much finer " than it was and that the time will soon come when it will be " really worthy of you."

There were other letters from the husband. One ended in " All my love and kisses my dearest one. Your very own adoring " and once extremely selfish husband." That shows, as I think, that he was devoted to his wife and if he had been selfish or unreasonable he was determined as far as he could to do the right thing. That letter in particular shows, or so it seems to me, that the wife was not well.

There follows the May-June 1946, leave, the last they spent together. On the first night there was the incident in regard to what she called teasing the child. It was an unfortunate beginning to that leave and it was not a happy leave. The mother gave evidence with regard to it. She said that the husband never spoke to the wife, ignored her completely. She was not quite so clear or definite about it when she was cross-examined. The wife said that he was in moods all the time and ignored her. The husband's account was somewhat different.

After that leave the husband left for Germany. He was held up and at Dover he wrote a letter on June 26, 1946, which shows he was extremely attached to his wife. He ended by

C. A.
1948
Lauder
v.
Lauder.
Singleton L.J.

saying: "I do so hope that you will soon be well and strong "again. All my love and kisses, my sweetest hearts. Your "very own darling." He had no reason to think at that time his wife was contemplating taking any steps against him. I find it difficult to think she was.

On June 27 she wrote to him "My very own dearest darling," and ended "With all my love your very own darling." He wrote on June 10, 1946, a letter which she kept, again in affectionate terms. On July 13, 1946, she wrote "My very "own dearest darling with all my love your very own darling." She wrote again on July 17 telling her husband she had seen a gynæcologist. She said: "I went up there—to Woking "last night and after consideration he said that it was imperative that I should be 'repaired' immediately as things "were becoming displaced inside me so I am going to be "done as soon as there is a bed in the one and only nursing "home there. I have conked out again to-day as a result of "walking to Dr. Higgins Home yesterday." She ends "With "all my love Darling."

There are other letters. Gradually it may be said that she becomes a little cooler. On August 20, 1946, she wrote to him a short note: "I am not much better. The pain from the "operation has just about gone but I'm still getting tummy "pains. Mummy looks tired—Susie is so active, but I can't "do anything yet. It looks as though I shan't even be as "well for this leave as I was for your last one. I've been ill "for so long now I suppose I can't expect to get better in a "minute." She concludes a letter of September 7, 1946, as follows: "As I am still completely unfit to do anything in "the house or for Anita and Mummy just can't manage any "more it means that you will have to spend your leave in "Plymouth. I wrote to Meccra on Thursday and explained "this and of course she and Judy will understand. It also "means that you will have to spend the night in London either "before or/and after you see the psychiatrist because Mummy "can't do another thing and your visit here can only be a "flying one."

And so the correspondence went on. He came over about September 23; she had seen the psychiatrist and he saw the psychiatrist at her request. There are two things in the psychiatrist's evidence to which I draw attention.

Dr. Mathias was asked: "When you did see the husband did "you find him an abnormal person or a perfectly ordinary "officer? (A.) At that time in 1946, Major Lauder, in a very "frank talk with me, admitted that he had certain moods. "I do not think Major Lauder would think of it in terms of "divorce or dissolution of any sort. We were discussing it as "fairly as we could, in which I helped both people. He had "told me at that time that he had moods. I have a note "somewhere where he says these moods were certainly not due "to any apathy or antipathy to his wife, but that were things "he was trying to get over, and that nothing would make him "happier than to be cured of such moods." That was 1946.

The other matter I want to refer to in Dr. Mathias' evidence is two questions asked by Mr. Turner in re-examination: "You say he described himself as having moods in which he "withdrew into himself—not out of any aversion for his "wife? (A.) Yes. (Q.) Is that a description consistent with "any particular mental state with which you are familiar? "(A.) Yes, there are people who are accustomed to becoming "withdrawn from realities, shall we say. In an extreme form "they may withdraw completely from reality. There are "others of us who withdraw occasionally for a short time."

Mr. Turner explained why he asked those questions. I confess I did not quite see the purpose at the time, but I would not have it thought for one moment that I regard this appellant as other than one responsible for his actions. It is not set up that he is insane or anything of that kind. He was a man subject to moods, and I think one has to bear that in mind, as Tucker L.J. said in the case of *Squire* v. *Squire* (1). One has also to bear in mind in considering these incidents, the wife's state of health and her position.

The wife consulted solicitors some time fairly soon after the husband had gone back to Germany. I think it was in July, 1946, although we have not been given the precise date. Immediately or shortly before he went back to Germany he had, at her request, found the money for the purchase of land on which a house was to be built for them. They had not had a house of their own before. Both of them thought that it would be better that they should; it had been pointed out that there might be a possibility of getting leave to build as she was the wife of an officer on service. In due course the certificate was obtained and one of his last acts before going back from that leave was to pay for the plot of land which had been bought; moreover, he realized securities to the value of 2,000*l.*

(1) Ante p. 51, 58.

for the building of that house. Very soon after he went back to Germany she consulted solicitors and she saw a doctor. In the result, the solicitors recommended that she should see the psychiatrist and the psychiatrist, Dr. Mathias, said that she was suffering from an anxiety state. He was asked : " Did she " show any symptoms of a nervous disturbance ? (A.) Yes. " The diagnosis of anxiety state means that she showed " considerable anxiety, or nervousness if you like, a certain " amount of emotional disturbance and inability perhaps to " think quite clearly about her condition at the time. (Q.) What " did you think was the proper treatment for her at that time ? " (A.) The proper treatment would have been to have given " her a sedative, a re-assurance, separating her from any " trouble that she might have experienced, and, of course, a talk " as to the origin of the condition." The psychiatrist saw her on that one occasion and did not see her again until May of this year, a short time before the hearing of her petition. He was asked : " You did not know there was a case con-" templated ? (A.) My note at the time is that divorce was " contemplated." The psychiatrist, so far as I see, did not treat her any further, but she went from solicitor to doctor, and from doctor to psychiatrist and the following January these proceedings were launched.

There was further correspondence when the wife told the husband that she was thinking of proceedings. He begged her not to do so. I find no reference in the judgment to the fact that after September, 1944, she never went to church again; there is no reference in the judgment to the fact that the parties have long ceased to have sexual intercourse. Those matters I think are of importance in forming a view of this case.

I recognize that the opinion of the judge of first instance is important and I hope that I say nothing against that, but, if he is shown clearly to have gone astray, it is for the Appeal Court to say so, but that court always ought to bear in mind the one who has seen and heard the witnesses is the best judge of those witnesses.

Having said that let me make this clear. I do not think that in this case of all cases the view of the judge upon the witnesses is of so much importance as it might be in other circumstances because the moods are admitted and are common ground between the parties, and it is really upon the moods or the fits of depression or the sulks that the learned judge decided the case.

I regard this case as rather involving the question as to what is the true inference to be drawn from all the circumstances as found by the learned judge. In his judgment, the learned judge said: "Having considered carefully, as I have had the "opportunity of considering during the last three days, the "demeanour of the parties, and, having heard the evidence "which had been given in very great detail by both the "petitioner and the respondent, I have come to the conclusion "that the respondent's conduct was of the nature described "by the petitioner. I have come to the conclusion that during "the whole of the married life, right up to 1946, the respondent "was continually in the habit of falling into moods of depression "or tempers, or call them what you will. At any rate, moods "when he refused to speak to his wife and when he ignored her, "sometimes for days on end, both privately and when other "people were there." There may be a question, I am not sure that there is, between the parties as to the word "refused," at least the husband did not speak to his wife for periods.

The learned judge then said: "That is, of course, corroborated to some extent in the correspondence, with which "I do not intend at this moment to deal, but it is quite "clear that both from the letters and from his evidence he "admits from time to time he did suffer from these moods, "and I am satisfied, having heard the evidence of the petitioner, "that he suffered from them to such an extent as to make her "life with him almost intolerable. It is clear too, I think, "on the evidence that he knew that when he ignored her in "this way it was upsetting her seriously, and the cumulative "effect of this, going on through the years, was in fact having "a serious effect upon her nervous and emotional stability."

They had had an extremely happy leave in January, 1946. The letters show that they were still attached to each other after that time and after the June, 1946, leave. I am inclined to think that to say that her life had become almost intolerable is putting the matter too high. As to the effect upon her health, well she was of a sensitive disposition and she was not well, and may be at some time the silences of her husband did affect her.

In those circumstances, is cruelty proved? Cruelty! I have referred to the law upon the subject. It may well be that a deliberate course of conduct, that which my Lord spoke of as putting the wife into Coventry, conduct which causes injury to health or a reasonable apprehension of danger to health is cruelty. For myself, I am not satisfied that there was such a deliberate course of conduct in this case. That there were moods is admitted. I think that there must be something more than that. I do not think that there were any intentional acts of his which amounted to cruelty, nor do I think that she so regarded them. I regard him as having been inconsiderate at times, but not as having been guilty of cruelty in law as I understand the meaning of that word. I do not feel that in these circumstances a decree nisi ought to have been granted against him on the ground of cruelty.

I would add that a husband and wife ought to take each other for better or for worse. There were faults on both sides I believe. I think she could have done more. Maybe if, when she was feeling well, she had gone to early morning mass things would be different. He did not pester her after September, 1944, but she neglected to go to church. Trouble arose on the first night of the May-June, 1946, leave and went on for a good part of that leave, although he says it was not all trouble. They were both difficult people.

I cannot think that the legislature in the word "cruelty" intended to include that which is proved in this case. I wish there had been another effort on her part, but she would not have him back when he came for his leave in September, 1946; she had then been to her solicitor, to a doctor and to a psychiatrist, and this petition was launched. A decree was granted against him which for myself I regret. I do not disguise the fact that I part from this case with a somewhat unhappy feeling. I would allow this appeal not because the learned judge did not take great care on his findings of fact, but because, in my view, cruelty was not established.

PEARCE J. In my opinion the appeal should be dismissed, and I agree with the judgment of the learned President.

In this case the trial judge saw the witnesses and observed their demeanour. Cruelty cases, more than any other class of case, depend particularly on a careful estimate of the witnesses. For in a cruelty case the question is whether *this* conduct by *this* man to *this* woman, or vice versa is cruelty. How far a spouse has to depart from the normal standards of kindness and self-control that are the basis of married life and how great an effect that departure has to have on the other spouse before it constitutes cruelty is always a question of degree, depending largely on the temperament, circumstances and health of each party. To attempt to decide that question in such a case as this without seeing the parties or their witnesses would be a hazardous business, and an appellate court does not lightly embark on it. Lord Thankerton in the case of *Watt (or Thomas)* v. *Thomas* (1) sums up the effect of the cases on this point, and says that the principles embodied therein may be stated in three propositions which my Lord has just read out. For reasons which I will give there seems to me here no question of misdirection of himself by the judge, and my view on the points dealt with by these three propositions, using their exact language, is as follows: 1. I am not satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion. 2. I do take the view that without having seen or heard the witnesses this court is not in a position to come to any satisfactory conclusion on the printed evidence. 3. I am not satisfied that the learned judge has not taken proper advantage of his having seen and heard the witnesses. Indeed, after reading the whole transcript of the evidence more than once, and after hearing the detailed and able arguments on both sides, I am satisfied that the learned judge took the fullest advantage of seeing and hearing the witnesses. His judgment confirms this; and his rare interventions show an open mind, a firm grasp of the evidence that had been given, and a correct realization of the problems before him.

Evidence was given by the wife and confirmed by her mother and other witnesses of the infliction on the wife by the husband, of continuous sulking in public and in private, by ignoring her and refusing to speak to her. These sulks, which the husband very euphemistically described as moods, were often brought on by any opposition to his will. Sometimes it was the acts of the wife which brought on the sulks, sometimes it was the acts of other persons (in one instance, the act of a taxi-driver's wife shortly after the death of the first child), and in one instance it was even his own act in going out without a mackintosh and getting wet. But whatever the cause, when they did come on, it was the wife who suffered. Sometimes she suffered in common with all those around him. Sometimes she was a lonely sufferer and he was natural or even very chatty with others while ignoring her.

The husband himself admitted that these sulks produced

---

(1) [1947] A. C. 484, 487, 488.

C. A.
1948

LAUDER
v.
LAUDER.

Pearce J.

complete and utter silences for days on end (although the parties differed about their exact length). He admitted that, though they did not always come on after he and she had had a disagreement, they frequently did. He admitted that she hated these sulks, that she was anxious that they should not come on, and that they had an effect on her. According to medical and other evidence these sulks had a marked effect on her, as one might expect they would. In July, 1946, just over a month after her husband's last leave, she was under the care of a doctor for an operation due to prolapse trouble and he considered that she was very overstrained mentally. He, accordingly, sent her to a psychiatrist. In September, 1946, the psychiatrist found her to be showing considerable anxiety or emotional disturbance which had mostly disappeared by May of this year, namely, 1948. He said in evidence that the husband's conduct, if it was as described by the wife, would have put quite a considerable strain on a normal healthy woman. On a person of the wife's mentality he said it would have an even worse effect and perhaps one which she might not be able to withstand or stand up to for a considerable time. And, in his opinion, if she had continued to live with her husband, the effect might even have been such that she would not have been able to attend the trial. No medical evidence to counter this was called by the husband. The wife in evidence, said (and, indeed, it was obvious) that to avoid these sulks she would try to take the course the husband wished, even against her better judgment. There were instances where she either gave in to some unwise insistence of his or did not give in, with a resulting sulk by him. In those instances there seemed to be in him a complete absence of normal kindness and consideration. The insistence or, as he called it, moral suasion which induced her to cycle (when she did not feel up to it) to early communion without food in May, 1943, when she was a few months pregnant, so that she fainted, was not kind. He admits that she knew it would have upset him if she did not go and that he would have had one of his moods as a result. His own counsel urged that he may not have known that pregnant women are apt to feel ill in the morning, but that seems unlikely. He insisted that she should go to the confirmation class when pregnant in September, 1944. She fainted again, and the priest brought her back and said that she was not to go the next Thursday unless she felt very much better and she was not to be forced to go. But the

C. A.
1948

LAUDER
v.
LAUDER.

Pearce J.

husband still insisted that she must go, and when she this time refused to go sulked in complete silence for a week as a result. When she was pregnant in 1944 the husband thought that she should walk through or past a herd of cows with a bull among them. He must have known by then that pregnant women are scared of situations where they may be jostled or have to show agility ; he knew, for she told him, that having produced a malformed child before, she was particularly anxious about her pregnancy and did not want to do anything that would hurt her baby. He knew that she did not want to go past the herd, and yet he expected her to do so ; and, when she did not, he left her to find her way home. Such conduct falls strangely short of normal standards of decent kindness from a husband to a pregnant wife. There was a somewhat similar incident about the fuel office when to please him and avoid a sulk she walked too far and was ill with a near miscarriage. All these incidents were very fairly weighed up by the learned judge.

He found that the husband's conduct was of the nature described by the wife, that during the whole married life right up to 1946 the husband was continually in the habit of falling into moods of depression or tempers, or call them what you will—moods when he refused to speak to his wife and when he ignored her, sometimes for days on end, both privately and when other people were there. He found that the husband knew that when he ignored her in this way it was upsetting her seriously, and that in September, 1946, she was in a serious nervous state and that that state was wholly or largely the result of the treatment she had had from the husband, and he gave a decree on the ground of the husband's cruelty. I am not surprised that he so decided.

The attacks that are made on the judgment are these. First, it is said that intention must be proved to substantiate a charge of cruelty. It was argued by Sir Charles Doughty in opening the appeal, that the moods sprang from matters beyond the husband's control and were due to temperament and to hardships suffered in the war. And it was argued by Mr. Sheldon, the junior counsel for the ~~wife~~, that the moods were not an act of volition but were negative acts ; that, if the husband was taciturn when he was moody, it could not be an act of cruelty on his part not to talk when he did not feel like talking and he argued that the acts here complained of could not amount to cruelty. The answer to those arguments

C. A.
1948
LAUDER
v.
LAUDER.
Pearce J.

is to be found, I think, in *Squire* v. *Squire* (1), and the cases therein referred to. In that case the conduct complained of was the consequence of the wife's illnesss and did not consist of malignant acts done with the intention of injuring the husband, yet the husband was held entitled to a decree on the ground of cruelty. Tucker L.J. (2) approved of the dictum of Shearman J. in *Hadden* v. *Hadden* (3), where he said: "I do "not question he had no intention of being cruel but his "intentional acts amounted to cruelty." Assuming in this case that the husband had no intention of being cruel, yet his intentional acts amounted, in the view of the trial judge, to cruelty. No medical evidence was called to show that the husband did not know the nature and quality of his acts. And plainly he did know. It was perfectly within his power to address civil remarks to his wife. On some occasions he was speaking normally to others but chose not to speak to her. When he had been reprimanded by the wife or her mother or sister he improved for a time, and then again let his temper get the better of him. This shows that he could control his sulks when he made the effort. In most incidents in cruelty cases the respondent's worse nature becomes temporarily in control over his better nature, but that does not make his acts any less intentional. The fact that in this case the cruelty was an omission rather than a commission does not make it any the less cruelty. It was in his power to avoid those omissions by normal civility to his wife, but he did not choose to exercise the necessary control over himself or sink his egotism for that purpose. I fully appreciate that in weighing the evidence one would scrutinize more carefully the evidence of sins of omission, than evidence of sins of commission, since they are more liable to be due to inadvertence that was not culpable. But in this case the evidence clearly points to the sulks being avoidable and intentional, and the trial judge has weighed the matter carefully.

No reported case has been shown to us where sulking, and sulking alone, is the cruelty complained of. But cruelty can have many manifestations and few cases are reported. The principle involved is clear. In *Moss* v. *Moss* (4), a unanimous judgment of the Court of Appeal given by Phillimore L.J. (5), in the passage that my Lord has read, puts it clearly. In none of the cases approved of in that passage was there any physical violence. Those cases were merely concerned with the impact of the husband's course of conduct on the mind and health of the wife. It would be unfortunate if this court were to refuse its protection on the ground that the injury to the complaining spouse's health was only caused by the subtle weapon of sulking.

---

(1) Ante p. 51.
(2) Ibid. 57.
(3) The Times December 5, 1919.
(4) [1916] P. 155.
(5) Ibid. 162.

On the facts in this case the sulks affected the wife's health and the husband knew they affected her. The sulks were, as even he admitted expressly or by implication when called to task about them, misconduct as a husband on his part, and often they were meant to wound and hurt. Whether they were or not always so meant, they had that effect and caused injury to health and so constitute cruelty on the principles laid down.

For those reasons in my opinion, the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Wedlake, Letts & Birds, for Gidley, Wilcocks & Maddock, Plymouth.*

Solicitors for the respondent: *Baylis, Pearce & Co., for Stevens & Stevens, Farnham, Surrey.*

THE SOBIESKI.

C. A.
1948
Dec. 13, 14, 15, 16.
1949
Jan. 31; *Mar.* 7.
Bucknill, Cohen and Singleton L.JJ.

Shipping—Collision—War operation—Troopship in convoy escorted by naval vessels—Admiralty instructions—High speed maintained in dense fog—Collision with unknown ship on crossing course—Negligent navigation by both—Escort vessels equipped with radar apparatus—Reliance of convoy for information—Failure to warn—Contributory negligence of Senior Escort Officer—Liability—At common law—Maritime Conventions Act, 1911, *not applicable—Maritime Conventions Act,* 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1, *sub-s.* 1; *s.* 9, *sub-s.* 4.

Before leaving port the Senior Escort Officer of a naval escort had given an undertaking to the master of the commodore ship of a convoy, which was proceeding at high speed in a dense fog on Admiralty instructions, that he would inform him of any unexpected danger of collision with an obstruction on the course of the convoy which was detected by the special radar equipment of the naval vessels but of which the commodore, whose vessel was not so equipped, remained ignorant, and he knew that the commodore relied on him for that information. The Senior Escort Officer

C. A.

1949

THE SOBIESKI

was not in charge of nor responsible for the navigation of the naval vessel he was on.

Held (1.) that it was the duty of the Senior Escort Officer to exercise reasonable care to inform the master of the commodore ship of danger from crossing traffic, and failure to inform him that the radar had revealed the presence of an unknown vessel and, later, that the explosion of depth charges during an attack on a suspected enemy submarine by the naval vessels, had caused the radar to cease to function, constituted negligence on the part of the Senior Escort Officer which contributed to a collision between the commodore ship and a strange vessel, both of which were also found to have contributed to the collision by their own negligent navigation.

(2.) That where there was no fault in the navigation of the vessel on board which the Senior Escort Officer was performing his duties, his liability was personal to him alone. Therefore, on the true construction of the provisions of the Maritime Conventions Act, 1911, section 9, sub-s. 4, did not operate so as to make him liable for a proportion of the damages.

APPEALS from the decision of Pilcher J. given on November 10, 1947.

The owners of the French steamship *Esperance* claimed damages from the owners of the Polish twin-screw motor vessel *Sobieski* in respect of a collision, which occurred during the hours of darkness, on April 13, 1945, between the two ships in a dense fog in the English Channel about six miles S.S.E. of the Nab Tower. The *Esperance*, which had been detached from an up-channel convoy, was making her way towards the Nab Tower in order to enter the Solent. The *Sobieski* was the commodore ship of a fast two-ship convoy proceeding from the Solent to Havre with troops on board with an escort of five naval craft. Commander A. F. C. Layard, R.N., D.S.O., was in command of the flotilla as Senior Escort Officer and was on board the Canadian destroyer *Loch Alvie* but he was not in charge of the navigation of that vessel. All the escort vessels were fitted with radar detection equipment. The *Sobieski* was not so equipped. The master of the *Sobieski* had been appointed to act as commodore by the naval authorities.

The owners of the *Sobieski* denied negligence in the navigation of their vessel, they alleged negligence by the *Esperance*, and further alleged that Commander Layard was negligent and that his negligence caused the collision between the *Sobieski* and the *Esperance*. Subsequently the owners of the *Sobieski*, by way of counterclaim, sued him in respect of the damage sustained by them. Commander Layard denied negligence and alleged negligence on the part of the *Esperance* and the *Sobieski*.

At the trial there was no dispute on the material facts, except on one point, namely, whether at the material time the *Esperance* was sounding a single prolonged blast at intervals of not more than two minutes in addition to a signal of two prolonged blasts followed by one short. The collision happened about thirty seconds after the vessels sighted one another and it was not suggested that either was negligent during that very short time. The important question was how the vessels got into that dangerous position. The written instruction to the master of the *Sobieski* from the Admiralty was that the speed of advance was to be fourteen and a half knots. As commodore he also received instructions that he was responsible for the safe conduct of the ships placed in his charge, and should give all necessary orders as to formation, course and speed, and was to use signal "Q" as a special sound signal in fog. His ship was connected to the escorting ships, and to the *Explorer* (the only other vessel of the convoy) by radio-telephony. He reported course and speed to Commander Layard but relied on Commander Layard to advise him to alter course if there was any danger from cross traffic. The practice of the war-time trips to France with troops was to maintain speed in fog.

The owners of the *Esperance* made no claim against Commander Layard.

Pilcher J. decided that the collision was solely caused by the negligence of Commander Layard, and that neither the *Sobieski* nor the *Esperance* was guilty of negligent navigation.

All three parties appealed: The owners of the *Esperance* and the owners of the *Sobieski* appealing from that part of the judgment which found the other ship free from blame.

K. S. Carpmael K.C., J. V. Naisby K.C. and *J. B. Hewson* for Commander Layard. This is the first action of its kind. The trial judge was wrong in holding that Commander Layard was solely to blame for the collision, and that the two ships which came into collision were not to blame at all. The masters of the ships in these convoys received certain instructions from the Admiralty as to their duties and responsibilities; the master of the *Sobieski*, who was the commodore of this convoy, realized his responsibilities. If the *Esperance* had remained stationary in the water as she ought to have done in the dense fog, there would have been no danger of collision. The most that Commander Layard could have done to warn the *Sobieski* of danger was to inform the master that he had seen a ship on the radar screen and that he had now lost it.

[COHEN L.J. The Crown compels ships to proceed in convoy and would owe them a duty to provide protection while so navigating, and that care should be provided without negligence on the part of the Crown's servants.]

It could only be said if the *Sobieski* was entitled to keep the speed of fifteen knots in dense fog, and was entitled to rely on any undertaking given him by the senior officer; all that Commander Layard's undertaking was that he would do all he reasonably could to keep the master of the *Sobieski* informed.

[SINGLETON L.J. All the commander could do would be to act reasonably in all the circumstances and do what a reasonable man would do.]

W. Porges and *Vere Hunt* for the owners of the *Sobieski*. Commander Layard had information of the exact distance and the exact bearing of the *Esperance*. When the *Esperance* was first seen on the radar screen he had conclusive information that the bearing of the *Esperance* had not altered, and that risk of collision existed, and, whether that ship was moving or not, the progress of the other vessels would increase danger of collision. He admitted in evidence that the thought of ordering alteration of course or speed by the *Sobieski* did not occur to him.

[COHEN L.J. What action would he have advised the *Sobieski* to take?]

He could have informed the *Sobieski* that she could no longer rely on the radar information because it had ceased to function, and therefore, the master of the *Sobieski* would have to consider whether it was a proper thing to proceed at such a high speed in dense fog.

[COHEN L.J. Could it not be said that what Commander Layard did, or omitted to do, after he went to the attack on an assumed enemy submarine, and his radar became out of order, was not negligence but merely an error of judgment ?]

Before going to the attack he ought to have told the master of the *Sobieski* that the *Esperance* had been seen on the radar on a constant bearing. The *Sobieski* had no knowledge that any attack had taken place; the master had reason to think that the screen of protection provided by the destroyers was intact and considered that he was justified in proceeding at high speed relying for information on the naval escort for any information calling for a change of course or speed. (Counsel referred to *The Vernon City* (1), and the observations of Langton J. of the rights and duties of ships in convoy.)

R. F. Hayward K.C. and *P. Bucknill* for the owners of the *Esperance.* The non-changing of the bearing when two ships are approaching is an elementary fact that danger of collision exists and was known to all seamen. The very highest degree of care was demanded from Commander Layard. The position of the *Esperance* could be determined at any time from moment to moment by Commander Layard's ship. The *Esperance* was a potential danger but nothing was done by Commander Layard to reduce that danger either by alteration of the speed or the course. That indicated grave negligence on the part of someone. The Commander alone had the combined knowledge of the danger; he could have given orders for the course to be altered with complete safety. By a slight alteration the whole flotilla could have passed safely astern of the *Esperance.* The escort all had radar equipment. The practical results of a reduction of speed would have been (1.) less danger in the event of a collision; (2.) more time to take action; (3.) more time for the other vessel or vessels to take action to avoid collision and to get a correct appreciation of the true position; and (4.) the easing of the engines and reduction of speed increases facilities for hearing. At all times Commander Layard realized that the *Esperance* was a potential danger to the convoy approaching to pass ahead of the *Esperance.* Although she was stationary, it was not to be assumed that she would remain stationary; her master was justified in getting away from where he had heard some formidable underwater explosions suggesting the firing of torpedoes and, though he disregarded the provisions of Art. 15 of the Rules for Preventing Collisions at Sea after hearing signal " Q " forward of his beam, that signal conveyed nothing to him except that it was an International Code signal. The distinction between the responsibilities of a master and a commodore was not raised in the court below.

(1) [1942] P. 9, 61.

[COHEN L.J. Is it not res ipsa loquitur ?]

Carpmael K.C. in reply.

Cur. adv. vult.

Jan. 31, 1949. BUCKNILL L.J. stated that Cohen L.J. had authorized him to say that he agreed with the judgment that he was about to read. His Lordship then stated the facts and reviewed the evidence, which, for the purpose of this report, sufficiently appear in the headnote and preliminary paragraph.

On the evidence he came to the conclusion that the *Sobieski* was to blame for not stopping her engines when she heard the first signal from the *Esperance*, and still more to blame for not stopping her engines on hearing the second signal from the *Esperance*, and for keeping on at fifteen knots until within a minute of the collision. He thought that the *Esperance* was also to blame for the omission to sound a single long blast at regulation intervals to let the master of the *Sobieski* know that he was meeting a ship with way upon her but he did not regard her blame as equal to the blame to be attributed to the *Sobieski*. Neither ship was grossly negligent, each to some extent suffered through the misfortunes of the war and the lack of diligence on the part of Commander Layard, and his Lordship thought the proper proportion of blame would be three-fifths in respect of the *Sobieski* and two-fifths in respect of the *Esperance*.

With regard to Commander Layard, his Lordship continued : The question whether Commander Layard was guilty of negligence which caused or contributed to the collision relates to the claim by the *Sobieski* against him. I think that, in the circumstances, he had a duty to those in charge of the *Sobieski* to exercise reasonable care in the performance of the task which he had undertaken to perform, namely, to inform the master of any unexpected dangers to his ship, which he could detect by his radar but of which the master remained ignorant in the fog. Commander Layard had knowledge, through his radar, of the position of the *Esperance* in the fog as a potential danger to the *Sobieski* some twenty minutes before the collision. To his knowledge that danger continued and increased during the next ten minutes, and, so far as Commander Layard knew, was never terminated. He also knew that the *Sobieski* was steaming at a speed which was very excessive in the dense fog but for the safety afforded her and other ships by careful use of the *Loch Alvie's* radar.

The next question, therefore, is whether Commander Layard failed in that duty. I agree on this point with the conclusion reached by Pilcher J. but, speaking for myself, I think that the more serious negligence of Commander Layard was in his failure to give any warning of the presence of the *Esperance* to the *Sobieski* by radio-telephone after the *Loch Alvie's* radar was put out of action.

The learned judge found that the radar of the *Loch Alvie* was put out of action some eight minutes before the collision. The *Sobieski* and the *Esperance* were then not more than two miles apart, with the *Esperance* fine on the starboard bow of the *Sobieski*. In those circumstances, it seems to me that Commander Layard at that time failed in his duty to take reasonable care to warn the *Sobieski* of a really imminent danger of which he had clear knowledge, and of which, so far as he knew, the *Sobieski* had no knowledge. In my opinion, he should have sent immediately a radio-telephone message to the *Sobieski* as soon as he knew that his radar was out of action to tell him of that fact, and that she was approaching a ship fine on her starboard bow, which had been in approximately the same position for some ten minutes. On receipt of this message I think it almost certain that the *Sobieski* would have stopped her engines and reduced her speed, so that when she sighted the *Esperance's* lights the ships would have been able to avoid a collision. Commander Layard had no reason to assume that the *Esperance* would remain stationary or would move away from the track of the *Sobieski* during the eight minutes between the time when the *Loch Alvie's* radar went out of action and the time when the *Sobieski* reached the *Esperance*. If Commander Layard relied on getting some information from the destroyer *Monnow* as to the relative positions of the *Esperance* and the *Sobieski* during those eight minutes, he in fact got no such information until almost immediately before the collision, when the *Monnow* very inaccurately said that there was no risk of collision. I think that Commander Layard's failure to warn the *Sobieski* contributed to the collision, because the *Sobieski* was navigating without any accurate knowledge of the *Esperance's* position, and was proceeding in reliance on getting a warning, which she in fact never received but should have received.

The burden of having to find Commander Layard to blame, is lightened by the fact that both our assessors advise us that good seamanship required him to report the *Esperance* to the *Sobieski* as soon as he became aware of the risks created by her presence. Their advice agrees with the opinion expressed by the Elder Brethren to the learned trial judge.

The position, therefore, as between the owners of the *Sobieski* and Commander Layard is that their negligence and his negligence caused the collision between the *Sobieski* and the *Esperance*. If the claim of the owners of the *Sobieski* against Commander Layard could be dealt with under the Maritime Conventions Act, 1911, it would be possible to make an apportionment of the damage done to the *Sobieski*, but, subject to argument on the point, I do not think that the Act applies to such a case as this.

The Law Reform (Contributory Negligence) Act, 1945, came into force on June 15, 1945, and cannot apply to this case, in which the damage was done on April 13, 1945. It, therefore, seems that the common law applies to the claim of the owners of the *Sobieski*, and that this claim fails on the ground of their contributory negligence.

SINGLETON L.J. I agree.

On March 7, 1949, the court heard the arguments of counsel on the question whether Commander Layard, against whom it was held that his negligence was partly the cause of the collision between the *Esperance* and the *Sobieski*, was liable for an apportionment of the damages suffered by the *Sobieski* under the provisions of the Maritime Conventions Act, 1911.

W. Porges and *Vere Hunt* for the *Sobieski*. Counsel read s. 1, sub-s. 1, and s. 9, sub-s. 4, of the Maritime Conventions Act (1). Section 9, sub-s. 4, brings Commander Layard within the meaning of s. 1 and he can be made liable for damages. He was in command of the *Loch Alvie* and the four other naval units and he owed a duty to the convoy. His ship and all the others of the escort were specially equipped for the detection of invisible vessels and he was in fault for not letting the other vessels know that his own radar was out of order. The negligence of a vessel within the meaning of the Act must be the negligence of the persons on board her. The defence of contributory negligence has not to my knowledge been ever taken before in cases of the present kind.

---

(1) The Maritime Conventions Act, 1911, s. 1, sub-s. 1: "Where, "by the fault of two or more "vessels, damage or loss is caused "to one or more of those "vessels . . . . the liability to "make good the damage or loss "shall be in proportion to the "degree in which each vessel was "in fault.

Section 9, sub-s. 4: "This "Act shall apply to any persons "other than the owners respon"sible for the fault of the vessel as "though the expression 'owners' "included such persons . . . ."

[BUCKNILL L.J. The *Loch Alvie* does not come within s. 1 of the Act at all, it seems to me.]

[COHEN L.J. Has there ever been a case where an admiral has been made responsible for the negligence of the commander of another ship under the admiral's command ?]

[SINGLETON L.J. The fault must be on the "vessel." If that is so, a person may be brought in under s. 9, sub-s. 4.]

The other vessels were in fault by failing to keep an extra look-out. (*The Rockabill* referred to (1).) Sections 1 and 9 were considered in that case.

[BUCKNILL L.J. The difficulty is to prove that the *Loch Alvie* was to blame.]

Carpmael K.C. for Commander Layard. There has been no claim until today that the *Loch Alvie* or any of the other naval vessels were negligently navigated. Commander Layard was not a "person" identified with the ship in any form ; his position was no different from that of a superior naval officer stationed ashore. [*The Glaucus and City of Florence* referred to (2).] Unless the claim of the *Sobieski* against Commander Layard can be brought within the Maritime Conventions Act, 1911, the common law rule of contributory negligence applied. The proper order here is that made by this court in their judgment delivered on January 31, namely, that the *Esperance* was two-fifths and the *Sobieski* three-fifths to blame for their collision. The claim against Commander Layard should be dismissed.

Porges replied.

BUCKNILL L.J. This hearing today has been rendered necessary by the form of our judgments in the appeal. In the appeal we affirmed the judgment of Pilcher J. that Commander Layard was partly to blame for the collision between the *Sobieski* and the *Esperance*. We found that the *Sobieski* was also partly to blame for that collision and that the *Esperance* was also to blame.

The position, therefore, was that so far as the claim of the

(1) [1937] P. 93.

(2) [1948] P. 95.

C. A.

1949

THE SOBIESKI.

Bucknill L.J.

owners of the *Sobieski* against Commander Layard was concerned, both the *Sobieski* and Commander Layard were to blame, and the conclusions to which we came were these, as it appears in my judgment : " If the claim of the owners " of the *Sobieski* against Commander Layard could be dealt " with under the Maritime Conventions Act, 1911, it would " be possible to make an apportionment of the damage done " to the *Sobieski*, but, subject to argument on the point, I " do not think that the Act applies to such a case as this."

The conclusion to which I have come, speaking for myself, is that the Maritime Conventions Act does not apply to this case.

Mr. Porges, in support of his argument that the Act did apply, put forward four points. He said (1.) that the *Loch Alvie* was to blame for the collision ; (2.) that Commander Layard was responsible for the fault of the *Loch Alvie* ; (3.) that the four other vessels in the escort were to blame for the collision, and (4.) that Commander Layard was responsible for their fault. So far as the four other vessels were concerned, I can see no evidence to support the contention that they were to blame for the collision, and, therefore, the point that Commander Layard is responsible for their fault goes. But there is something to be said for the first two points, namely, whether the *Loch Alvie* was to blame for the collision and whether Commander Layard was responsible for her fault.

The point turns on s. 1 and s. 9, sub-s. 4, of the Maritime Conventions Act, 1911.

Warrington J. pointed out in *The Cairnbahn* (1), that : " The " Maritime Conventions Act personifies the vessel, treating " it at one time as the actor, at another as suffering damage " or loss, and at another as liable to make good such damage " or loss. The truth is, of course, that for the purpose of " ascertaining the legal effect, the word in one context connotes " those responsible for the navigation of the vessel ; in another " those who are interested in her, her cargo or freight ; and " in another those who are in law answerable for the conduct " of those in charge."

The first question one has to ask oneself is : Was there any fault in the navigation of the *Loch Alvie* ? The evidence was to this effect, that Commander Layard was the senior officer in charge of the escort. He had undertaken, so far as the *Sobieski* was concerned, that he would give her warning

(1) [1914] P. 25, 34.

of any obstruction in the Channel which the radar apparatus of the *Loch Alvie* detected but which the *Sobieski* would not know about because of the fog. Commander Layard was not in charge of the navigation of the *Loch Alvie* in any way. That is clear from the fact that when those in charge of the *Loch Alvie's* Azdic picked up some object which might be a hostile submarine, the commander of the *Loch Alvie*, without consulting Commander Layard, dashed in to drop his depth charges, and in so doing put the radar apparatus of the *Loch Alvie* out of use. It seems to me it is impossible to suggest that Commander Layard was in charge of the navigation of the ship, or that the ship was in fault because Commander Layard failed to use the radio-telephone which he could have used to warn the *Sobieski* that the radar apparatus on the *Loch Alvie* had picked up the *Esperance*, or later on to warn the *Sobieski* that the radar had ceased to work and that he was no longer able to give the warning to the *Sobieski* which the radar would have enabled him to give.

There are no reported cases which throw much light on this particular point. *The Rockabill* (1), is rather a different case, because there the question was whether the Mersey Docks and Harbour Board was partly to blame for giving certain instructions to the *Rockabill* to leave the dock and go out into the Mersey at a time when there was a risk of collision with the *King Orry* which was coming down from the Princes Landing Stage. The Court of Appeal in that case agreed with the judgment of the trial judge that the Maritime Conventions Act did not apply to the claim against the Mersey Docks and Harbour Board, assuming that the *Rockabill* was partly to blame and the dock authorities were also partly to blame for the navigation of the *Rockabill* in going out into the river at an improper time and colliding with the *King Orry*. Scott L.J. in his judgment in the Court of Appeal said (2): "But assuming that the Dock Board were "guilty of negligence as found by the learned judge, then "I agree that under the Maritime Conventions Act there "is nothing to alter the old common law position which "confers freedom from liability on the defendant in a case "of this sort where the accident is contributed to by the "negligence of the plaintiff."

We have been referred to the case of *The Glaucus and City of Florence* (3), which is a recent decision by Pilcher J. In

(1) [1937] P. 93.
(2) Ibid. 109.
(3) [1948] P. 95, 99.

that case Pilcher J., in the course of his judgment said: "I think that the contention put forward by the owners "of the *Glaucus* is justified in principle. If, as was very "often the case in convoys navigating under war conditions, "there had been on board the *Glaucus* a naval officer acting "as commodore of the convoy, it is difficult to see how the "owners of the *Glaucus* could have been made responsible "for any damage occasioned by a negligent order given by "such commodore acting within the scope of his authority "as commodore of the convoy and in his capacity as such "commodore. No doubt the master of a ship in convoy "always remains responsible for the safety of his own ship, "but in assuming the office of commodore of this convoy, "Captain McCarthy undertook duties and responsibilities "quite outside the duties which normally fall on the master "of a ship."

For these reasons, in my view, the Maritime Conventions Act does not apply with reference to the claim of the *Sobieski* against Commander Layard, and their claim fails by reason of the fact that the common law, and not the Maritime Conventions Act, applies.

As regards the costs, Commander Layard was found alone to blame by Pilcher J. He denied any negligence, and after a long trial the learned judge found he was to blame. The learned judge did not find the *Sobieski* to blame, so there was no question about contributory negligence there, and Commander Layard was ordered to pay all her costs. Here he has succeeded, not on the merits, if I may say so, because he has still been found partly to blame, but he has succeeded on a point which did not arise before the learned judge, namely, that the common law rule of contributory negligence applied, and I think that justice will be done if no order is made as to Commander Layard's costs, either here or below.

As regards the other two ships, the *Sobieski* and the *Esperance*, they were both acquitted of blame before the learned trial judge; they have both been found to blame here. There is a very small difference in the degree of blame—three-fifths and two-fifths—and there again I think both here and below the proper and fair order will be that no order will be made as to costs in respect of either of them.

We think that both ships should be given leave to appeal to the House of Lords.

C. A.
1949
THE SOBIESKI.

COHEN L.J. I agree, and I only want to add one word on the question of Commander Layard's costs. Although it is true the question did not become important until after the learned judge gave judgment in the court below, it is quite plain that the point on which he now succeeds could have been raised there. I think it is true to say that the point was never taken during the original hearing before us. It was raised by us at the end of our first judgment. In those circumstances, I think it is reasonable, as my Lord has suggested, that each party should be left to pay his own costs.

SINGLETON L.J. I agree.

Appeals allowed accordingly.

Solicitor for Commander Layard: *Treasury Solicitor.*
Solicitors for the owners of the *Sobieski*: *Constant & Constant.*
Solicitors for the owners of the *Esperance*: *Waltons & Co.*

H. G.

BERNBAUM *v.* BERNBAUM.

1949
Jan. 19.
Bucknill and Denning L.JJ.

Practice—Jurisdiction—Appeal—Application under s. 17 *of the Married Women's Property Act,* 1882 (45 & 46 *Vict. c.* 75) *before registrar or master—Appeal lies to judge in chambers—R. S. C.* 1883, *Or.* 54, *rr.* 12A, 21 *and* 22A*—Matrimonial Causes Rules,* 1947, *rr.* 59, 82.

Applied. WAIGHT *v.* WAIGHT AND WALKER [1952] P. 282

Appeal from the decision of a registrar in the Probate, Divorce and Admiralty Division, and of a master in the King's Bench Division, on a summons under s. 17 of the Married Women's Property Act, 1882, lies to the judge in chambers, and the note at p. 1118 of the Annual Practice, 1948, that such an appeal from the master lies to the Divisional Court is erroneous.

INTERLOCUTORY APPEAL from Barnard J.

A summons was taken out under s. 17 of the Married Women's Property Act, 1882, before Mr. Registrar Long. From his decision the wife appealed to Barnard J., sitting in chambers. Before the judge (who adjourned the summons into open court) the husband took the point that the judge had no jurisdiction to hear the appeal, since the appeal from the registrar's decision lay either to a Divisional Court or to the Court of Appeal. Barnard J. held that he had jurisdiction to hear

1949
BERNBAUM
v.
BERNBAUM

the appeal (1), and from this decision the husband appealed. The sole issue, therefore, was the jurisdiction of the judge in chambers to hear an appeal from a registrar on a summons under s. 17 of the Married Women's Property Act, 1882.

Seuffert for the husband. The appeal from a decision of the registrar on a summons under s. 17 of the Married Women's Property Act, 1882, lies to the Divisional Court or to the Court of Appeal: it does not lie to the judge in chambers By s. 17, the jurisdiction lay with a judge of the High Court and though he often referred the trial of the facts to a master or registrar he kept seisin of the matter throughout: *Humphery* v. *Humphery* (2). In 1937, R. S. C. Or. 54, r. 12, was made (3), and original jurisdiction under s. 17 was given to a master, as it was later to a registrar under r. 82 of the Matrimonial Causes Rules, 1947.

---

(1) [1948] W. N. 463.

(2) [1917] 2 K. B. 72.

(3) Married Women's Property Act, 1882, s. 17: "In any question "between husband and wife as "to the title to or possession of "property, either party . . . . "may apply by summons or "otherwise in a summary way to "any judge of the High Court of "Justice" or in appropriate circumstances to a judge of the county court; and the judge "may make such order with "respect to the property in dispute and as to the costs of and "consequent on the application as "he thinks fit"; and it was expressly provided that the judge might hear the application in his private room.

R. S. C. Or. 54, r. 12A (made in 1937): "Without prejudice to "such jurisdiction and powers as "he may possess by virtue of "r. 12, a Master of the Supreme "Court may exercise all the "jurisdiction and powers conferred upon a judge of the High "Court by . . . . s. 17 of the "Married Women's Property Act "1882 . . . ."

R. S. C. Or. 54, r. 22A (as in 1937): (1.) "There shall be a right "of appeal from any finding, "decision, order or judgment "arrived at, made, given, directed "or entered by any master of the "King's Bench Division on the "hearing or determination by him "of (*a*) any trial . . . ."

(2.) "Such appeal shall be to a "Divisional Court . . . ."

R. S. C. Or. 54, r. 22A as amended in 1940 after the words "any trial" in sub-r. 1 (*a*) "(but excluding any application "under s. 17 of the Married "Women's Property Act, 1882)."

R. S. C. Or. 54, r. 21: "Any "person affected by any order or "decision of a master may (except in the cases provided for in "r. 22A) appeal therefrom to a "judge at chambers . . . ."

Matrimonial Causes Rules, 1947, r. 82:—"Without prejudice to "the exercise of any jurisdiction "and powers conferred on him "by virtue of Or. 54 r. 12 of the "Rules of the Supreme Court "1883, a Registrar may exercise "all the jurisdiction and powers "conferred upon a Judge of the "Supreme Court by s. 17 of the "Married Women's Property "Act, 1882."

Rule 59: "A party may appeal "from an order or decision of a "Registrar to a Judge in "Chambers by summons . . . ."

[DENNING L.J. Unless the judge acting under s. 17 was a judge exercising jurisdiction *in chambers*, it is difficult to see where the Rule Committee obtained jurisdiction to make r. 12A. See s. 99, sub-s. 1 (*d*) of the Supreme Court of Judicature (Consolidation) Act, 1925.]

By R. S. C. Or. 54, r. 22A, which gives a right of appeal from a master on any trial to the Divisional Court, an amendment was made in 1940 (" but excluding any application " under s. 17 of the Married Women's Property Act, 1882 "). In a note to r. 22A, the editors of the Annual Practice, 1948, at p. 118 state : " From an order directing an issue under " the Married Women's Property Act, 1882, appeal lies to " a judge in chambers, but where a master tries an issue " an appeal from his judgment thereon lies to the Divisional " Court." In their view, therefore, the trial on this issue still lies to the Divisional Court notwithstanding the amendment which applies only to an appeal from an order directing an issue. Were the appeal to the judge, the provision of r. 12A, giving original jurisdiction to the master, would seem nugatory and merely to lengthen the proceedings by one step. By r. 81 of the Matrimonial Causes Rules, 1947, subject to the provisions of these rules and of any statute, the Rules of the Supreme Court apply with the necessary modifications and procedure in any matrimonial cause or matter. Rule 59 providing for appeal from an order of the registrar to a judge in chambers is not applicable to this order under s. 17 of the Married Women's Property Act, 1882, which is dealt with by the Rules of the Supreme Court. Rule 59 is applicable only to a matrimonial cause. Alternatively, since the master is taking the place of the judge under s. 17 of the Act of 1882, appeal lies from his decision to the Court of Appeal.

G. Hardy for the respondent. Rule 59 of the Matrimonial Causes Rules, 1947, is conclusive on this matter. The appeal lies to the judge in chambers. Sir Samuel Evans P. in *Countess De Gasquet James* v. *Duke of Mecklenberg-Schwerin* (1) said : " The rules of the Supreme Court do not affect or govern " proceedings in this Division ; and in no Division of the " Supreme Court, in any event, could such a rule give a right " to petition so as to create a jurisdiction in the Court which " otherwise did not exist."

(1) [1914] P. 53, 71.

BUCKNILL L.J. I will ask Denning L.J. to deliver the first judgment.

DENNING L.J. The question in this case is, to which court does an appeal lie from applications under s. 17 of the Married Women's Property Act, 1882? Under that section, until 1937, applications were made in the first instance to the judge of the High Court himself. If he thought it necessary, owing to the amount of detail involved, to refer the matter for inquiry and report, he did so by reference to a master, but the judge himself retained seisin of the summons throughout. Indeed, in the case of *In re* Married Women's Property Act, 1882; *Humphery* and *Humphery* (1), Scrutton L.J., pointed out that the section contemplates that the judge is to keep control of the whole matter and that he himself is to determine the issue. As the result, however, of experience, it was found that these applications between husband and wife often involved much inquiry into detail, as for instance into the ownership of separate items of furniture and other effects, with different considerations applicable to each item. Such applications were unsuitable for the decision of High Court judges and so, in 1937, a rule of the Supreme Court was made—R. S. C. Or. 54, r. 12A—enabling a master to exercise all the jurisdiction and powers conferred upon a judge of the High Court by s. 17 of the Married Women's Property Act, 1882.

In the course of the argument I asked what power had the rule committee to make that rule. Section 17 seemed to me clearly to contemplate that a judge of the High Court should deal with the matter himself. The relevant power of the rule committee is that conferred by s. 99, sub-s. 1 (*d*), of the Supreme Court of Judicature (Consolidation) Act, 1925, which enabled rules to be made under that Act "for prescribing "what part of the business which may be transacted and "of the jurisdiction which may be exercised by judges of "the High Court in chambers may be transacted or exercised "by masters of the Supreme Court, registrars of the Probate "Division, or other officers of the Supreme Court." It is clear that if the jurisdiction under s. 17 was a jurisdiction exercised by judges of the High Court "in chambers" the rule committee had power to make a rule enabling a master or a registrar to exercise that jurisdiction. But is the jurisdiction under s. 17 a jurisdiction exercisable by judges of the High

---

(1) [1917] 2 K. B. 72, 77.

Court "in chambers"? A judge may hear an application, if he likes, in his private room, but is it a jurisdiction exercised "in chambers"? Whatever doubts I might have had, if this matter were res integra, I am satisfied that I ought not now to give effect to those doubts. The rule has been acted upon. Ever since 1937, masters have exercised this jurisdiction and titles to property have been acquired thereunder. After this length of time, the Court of Appeal ought not to say that R. S. C. Or. 54, r. 12A, is ultra vires. It must be held to be intra vires, so that titles should not be invalidated.

Once it is held that a master may exercise this jurisdiction, where does the appeal from his decision lie? It is plain that in 1937, when a master first exercised this jurisdiction, the appeal from his decision lay to the Divisional Court. R. S. C. Or. 54, r. 22 A, then provided (1.): "There shall be a right of "appeal from any finding, decision, order or judgment arrived "at, made, given, directed or entered by any master of the "King's Bench Division on the hearing or determination "by him of any trial or reference of any action, cause, issue "or matter . . . . (2.) Such appeal shall be to a Divisional "Court." But experience showed that it was most inconvenient that appeals from the decision of a master under s. 17 should be dealt with by the Divisional Court owing to the amount of detailed investigation involved and so in 1940, an amendment was made to R. S. C. Or. 54, r. 22A, which expressly excluded from appeals to the Divisional Court any application under s. 17 of the Married Women's Property Act, 1882. The result of that exclusion was that R. S. C. Or. 54, r. 21, applied, by which: "Any person affected by any order or decision "of a master may (except in the cases provided for in r. 22A) "appeal therefrom to a judge at chambers."

From 1940, then, the appeal lay to the judge in chambers.

I see that in the notes to the Annual Practice, 1948, at p. 1118 there is to be found this passage: "From an order directing "an issue under the Married Women's Property Act, 1882, "appeal lies to a judge in chambers, but where a master "tries an issue an appeal from his judgment thereon lies to a "Divisional Court." I do not agree with that note. Under the amended r. 22A, all appeals from applications under s. 17 are excluded from the Divisional Court: they come under r. 21 and such appeals lie to the judge in chambers. I would add that, sitting as a King's Bench judge in chambers, I have often heard appeals from masters under s. 17, and there has been at least one appeal from a decision of my own in chambers to the Court of Appeal. No one has suggested hitherto that that was not the proper procedure. I am satisfied that in the King's Bench Division, as a result of the rules which I have mentioned, the appeal from a master on a summons under s. 17 lies to the judge in chambers and thence to this court. It was argued, alternatively, by Mr. Seuffert that if the master is taking the place of a judge under s. 17, then appeal from the decision of the master should be directly to the Court of Appeal. The answer is that, r. 12A itself being intra vires, so also is r. 21. The provisions of s. 17 have now to be read subject to the modification contained in the Rules of the Supreme Court.

Turning to the practice in the Divorce Division, until quite recently the practice there was the same as it had been before 1937 in the King's Bench Division. The application was made to a judge of the High Court who referred it to the registrar for inquiry and report. The judge retained seisin of the summons throughout. That procedure was found to be inconvenient, just as it had been found previously to be inconvenient in the King's Bench Division, and accordingly, by the Matrimonial Causes Rules, 1947, r. 82, the registrar was given power to exercise all the jurisdiction conferred on a judge of the Supreme Court by s. 17 of the Married Women's Property Act, 1882. The registrar then exercised the jurisdiction initially and an appeal lies from his decision to the judge in chambers, either under the Matrimonial Causes Rules, 1947, r. 59, whereby appeals from an order or decision of a registrar lie to a judge in chambers, or under the ordinary High Court rules. The basis of Mr. Seuffert's argument was that the note in the Annual Practice to which I have referred, namely, that in the King's Bench Division appeals lie to the Divisional Court was right. Hence he argued that in the Divorce Division also appeals from a decision of the registrar on a summons under s. 17 lay to the Divisional Court. But he is wrong as to the appeals in the King's Bench Division and hence his argument fails. It is interesting to note, as Barnard J. observed, that in the Divorce Division the practice hitherto has been to appeal on such a summons from the registrar to the judge in chambers and thence to the Court of Appeal. That was done in the case of *Peduzzi* v. *Peduzzi* (1) and no one suggested that that procedure was wrong.

(1) Unreported Oct. 25 and 26, 1948.

It would not be right for us, in a matter of practice and procedure, to interfere with the practice which has prevailed for so long, especially when it is the most convenient, expeditious and inexpensive way of dealing with the troubles which arise between husband and wife. For these reasons, I am of opinion that the decision of the learned judge was right. He had jurisdiction to entertain the appeal from the registrar. The appeal should be dismissed.

BUCKNILL L.J. I agree that the appeal should be dismissed for the reasons given by Denning L.J., and I have nothing to add.

Appeal dismissed.

Solicitors for the appellant: *Ferris, Roberts Thomas & Co.*
Solicitor for the respondent: *J. Clifford Watts.*

C. G. M.

M—T *v.* M—T AND THE OFFICIAL SOLICITOR (GUARDIAN AD LITEM FOR AN INFANT).

1948
Nov. 17.

Ormerod J.

Legitimacy—Issue on maintenance—Application as to paternity—"Non-Access" of 340 *days.*

On an issue to determine the paternity of an infant child born 340 days after the last possible date of intercourse between the mother and her husband:

Held, that it was impossible in the light of modern gynæcological knowledge for the child, who was normal in every respect at birth, to be legitimate. The medical evidence in *Gaskill* v. *Gaskill* [1921] P. 425 and other cases considered.

ISSUE directed to determine the paternity of an infant child.

The plaintiff (who disputed paternity) was the former husband of the first defendant, M—T. The Official Solicitor as guardian ad litem for the child was joined as second defendant.

The plaintiff and the first defendant were married in 1936. The marriage was dissolved in March, 1947, by reason of the defendant's adultery with a man unknown. That adultery was alleged to have taken place in or about July, 1942, and

1948

M—T
v.
M—T
AND THE
OFFICIAL
SOLICITOR.

there had been some evidence at the hearing of the petition for divorce that the wife had admitted to her husband that she had committed adultery at that time. There had also been evidence by the district nurse that the wife had said that she had had a menstrual period in June, 1942. The child whose paternity was in issue was born on April 13, 1943. She was a normal child of 7¾ lb. and there was no indication that she was either a premature or overdue baby. The Army records showed that the plaintiff embarked for overseas, after embarkation leave, on May 8, 1942—340 days before the birth of the child—and returned in 1945.

In October, 1947, the first defendant filed an application for maintenance for the child; and on the plaintiff raising the matter of the child's paternity it was ordered that that issue be tried accordingly.

At the hearing of the issue Sir Eardley Holland, a past president of the Royal College of Obstetricians and Gynæcologists, and consulting gynæcologist to the London Hospital, gave evidence as to the possible duration of pregnancy. He said that the birth of a normal healthy baby 340 days after coitus was impossible. Since the distinguished gynæcologists gave evidence during the hearing of *Gaskill* v. *Gaskill* (1) in 1921, there had been remarkable discoveries concerning the biology of human and other animal reproduction which enabled the modern gynæcologist to speak with much greater precision than was possible twenty years previously; but it was not to be forgotten that in *Gaskill* v. *Gaskill* (2) the longest case any of the three expert witnesses had themselves come across was 315 days, and that that was a menstruation—labour, not insemination—labour, interval.

The child with which the court was now concerned was a normal female child of 7¾ lb. If a baby was greatly overdue the chief sign was excessive size and weight at birth; there was also what was called a greater ossification of the bones and the head was much harder. The greatest length of pregnancy which had to his knowledge been notified was 331 days, and a reference to that case had been made in *Gaskill* v. *Gaskill* (3). That child had weighed 15 lb. at birth and had had tremendously broad shoulders, a very hard head, and other abnormalities. Dr. Fairbairn had said (4) that he would

(1) [1921] P. 425.

(2) Ibid. 429 (Dr. Fairbairn's evidence).

(3) [1921] P. 425, 431.

(4) Ibid. 430.

have rejected a period of 331 days unless there were written on the body signs of prolonged pregnancy. He himself, (Sir Eardley), believed that in every case of a prolonged insemination—labour interval the babies had been of excessive size and development unless they had died, which was not uncommon if the pregnancy went over 303 to 305 days.

1948

M—T
v.
M—T
AND THE
OFFICIAL
SOLICITOR.

The medical evidence in *Hadlum* v. *Hadlum* (1), which had been given in the court of first instance by a general practitioner without specialist qualifications, was read to Sir Eardley, who said that he could not agree with certain of the statements which had there been made, particularly as to the possible length of pregnancy which had been suggested. Among the questions which arose out of the medical evidence in that case Sir Eardley was asked about the period between insemination (i.e. coitus) and fertilization, about the date of ovulation relative to menstruation and about the length of life of the semen (after coitus) and of the ovum (after ovulation); he was also asked about the possibility or otherwise of the ovum being fertilized by spermatozoa which had remained in the female genital tract during a period of menstruation, and of the possibility of a menstruation following upon conception and therefore occurring during pregnancy.

Sir Eardley said that the spermatozoa did not as a rule remain capable of effecting fertilization for more than two or three days after being deposited in the female genital tract. Fertilization normally took place at the time of insemination, that is, of coitus, and he had never heard of an authentic case of an interval as long as twenty-one days, which had been suggested as a possibility in the medical evidence in *Gaskill* v. *Gaskill* by Dr. Fairbairn (2), before modern methods of examination were available, or of fourteen days, which had been referred to in the evidence given in *Hadlum* v. *Hadlum* (1).

Ovulation normally took place about fourteen days before the beginning of menstruation and the ovum did not live for more than two days at the outside. It was therefore only in the middle part of the usual interval of approximately twenty-eight days between two menstrual periods that fertilization was normally possible. In rare cases there may be ovulation earlier or later than the mid-point, with the result that fertilization could occur earlier or later in relation to the menstrual period; but even in such cases the insemination-labour interval would be shortened or lengthened by not more than about ten days.

---

(1) Ante p. 197.

(2) [1921] P. 425, 427.

Referring to the suggestion that a menstrual period might intervene between coitus and fertilization, Sir Eardley said that that was biologically impossible; nor, he said, was it possible for true menstruation to take place after pregnancy, for once there was pregnancy the ovulation ceased, and menstruation could not occur in the absence of the changes in the ovary that accompany ovulation. It was, however, by no means unknown for women to have a bleeding after conception, and it was possible for a woman to mistake such a flow for menstruation; but such bleedings were not menstrual periods and were believed to be caused by some disturbance of the attachment of the ovum to the uterus, or a slight threat of abortion.

As the average menstruation-labour interval was 280 days and the average insemination-labour interval was between 265 and 270, in the case under consideration a normal child would have been born in about February, 1943. It was impossible for a normal child to have been born, as was suggested, as late as April 13, 1943, which would be 340 days after the last possible date of insemination.

C. A. Marshall-Reynolds for the plaintiff.
Stuart Horner for the second defendant.
The first defendant did not appear and was not represented.

ORMEROD J. (after referring to the facts): On these facts I have to decide whether it can be said that this child is legitimate or whether she is the result of some adulterous intercourse, which the wife had at a later time. It is suggested that I should take into account evidence of the wife's conduct and also that she had admitted that some short time after her husband left she committed adultery on one occasion with a Canadian. Even if I am entitled to take this evidence into consideration, I doubt very much whether it would help me in coming to a decision. It may be that the wife at a later stage committed adultery, but that should not prevent me from saying that the child is the daughter of the husband, if the child could have been born as the result of intercourse on or before May 8, 1942, because the presumption must be in favour of the child being legitimate.

If the wife had had her menstrual period in June, 1942, as she told the district nurse was the case, it might be a proper inference to draw that she could not have been pregnant before that date. But the evidence of the gynæcologist who has been called is that in the first three months of pregnancy bleeding may occur which can be mistaken by the woman herself for normal menstruation, and it would be quite impossible to say now whether the bleeding in June, 1942, was normal menstruation or not.

As I see it therefore I am thrown back on to this : There is a child who was born on April 13, 1943, who was normal at birth in every respect and who showed no sign of being overdue ; and there is undisputed evidence that the latest occasion upon which there could have been sexual intercourse between the husband and the wife was May 8, 1942, which was 340 days prior to the date of birth.

The evidence of the gynæcologist who has been in the witness box and has spoken from a wealth of experience both of his own practice and of the practice of others is that it is quite impossible that after that length of time a normal child would be born. It is true that in earlier cases there has been evidence adduced, and indeed it has been found, that it was not impossible for a child to be born more than 340 days after the last menstrual period ; but Sir Eardley Holland said that in the last twenty-seven years there had been a considerable advance of knowledge of these matters, and that he is quite satisfied that if the gynæcologists who were giving evidence, for instance, in *Gaskill* v. *Gaskill* (1) in 1921 had had the experience and the knowledge which had since been accumulated they would have given evidence which agreed with his. Sir Eardley Holland also pointed out that May 8, 1942, was the last possible date of insemination and that the period from the last menstruation, which was the period taken in the other cases, would be about fourteen days longer, that is, a period of some 354 days.

In these circumstances I am left with no other conclusion on the evidence than that it is impossible that the child could have been born as the result of a coitus not later than May 8, 1942, and that being so I am bound to find that the child is not legitimate.

Solicitors : *Vandercom, Stanton & Co.* ; *The Official Solicitor.*

J. B. G.

(1) [1921] P. 425.

1949
Mar. 10.

Barnard J.

IN THE ESTATE OF RACHEL THOMAS, DECD.

DAVIES AND OTHERS *v.* DAVIES AND ANOTHER.

Probate practice—Trial of action in county courts—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 59—*Court of Probate Act,* 1858 (21 & 22 *Vict. c.* 95), *s.* 10—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 150—*County Courts Act,* 1934 (24 & 25 *Geo.* 5, *c.* 53), *ss.* 60, 61.

The county courts have a jurisdiction in all probate matters which is limited only by the place of abode of the deceased and the size of his estate. The law applicable in deciding this question of jurisdiction has not been altered by legislation subsequent to the Court of Probate Acts of 1857 and 1858.

Dunn v. *Dunn* (1860) 1 S. & T. 521, *Norris* v. *Allen* (1862) 2 S. & T. 601, and *Zealley* v. *Veryard and Bridle* (1866) L. R. 1 P. & M. 195 applied.

On an application by summons which was made with the concurrence of both plaintiffs and defendants it was directed that a probate action be transferred for trial to a county court.

SUMMONS for directions adjourned for argument into open court as a procedure summons.

After the close of the pleadings in a probate action the solicitors for the plaintiffs applied by summons to the registrar asking "that by the consent of the parties the judge of the "Aberdare county court be invested with the contentious "jurisdiction and authority of the Court of Probate to hear "and determine the issue raised by the parties in this action." At an adjourned hearing of the summons it was intimated by the registrar that although it was desirable for the action to be transferred if possible to the county court in order to save expense it appeared that s. 60 of the County Courts Act, 1934, was limited to questions as to the grant or revocation of probate, and that he experienced difficulty owing to a paragraph on the question at p. 95 of Tristram and Coote's Probate Practice (19th ed.).

The matter was accordingly adjourned to the judge in chambers, who heard it in open court.

J. E. N. Russell for the plaintiffs.
J. E. S. Simon for the defendants.

BARNARD J. This is a summons which has been adjourned into court and arises out of a probate action concerning the testamentary dispositions of Rachel Thomas, deceased. It is quite clear from the evidence before me that the personal estate of the said deceased is under 200*l.* and the real estate does not exceed 300*l.* The evidence is also clear that when the deceased died she had a place of abode within the jurisdiction of the county court of Aberdare. Both the plaintiffs and the defendants desire that the action should be tried in the county court at Aberdare.

The only difficulty, as I see it, arises from a passage in Tristram and Coote (19th ed. at p. 95), which reads as follows: "A county court judge has no power to pronounce "for the force and validity of a will by decree; he can only "order a grant of representation to issue, or to be revoked "(County Courts Act, 1934)." It is not inappropriate to look at some later passages in this well-known practice book in which the jurisdiction of county courts is referred to. At p. 575, you will find set out the places of trial where an action may be ordered to be tried firstly in Middlesex, secondly at assizes and thirdly in the county courts. At pp. 584 and 585 are set out the requirements for entry for trial firstly in London, secondly in Manchester and Liverpool, thirdly at other assizes, and fourthly in the county courts, and under the heading "County Court" is this passage:—"The procedure in probate actions transferred to the county court "will be found set out in the County Court Rules, 1936, "Or. XXXVI".

There can be no doubt that when the Court of Probate came into existence under the Court of Probate Act, 1857, which was followed very shortly by an amending Act, the Court of Probate Act, 1858, the county courts had jurisdiction in all probate matters limited only by the size of the deceased's estate and by the requirement that the deceased should have had at the time of his or her death a fixed place of abode within the jurisdiction of the county court which was to deal with the probate matter.

That was the position quite clearly up to the passing of the Supreme Court of Judicature (Consolidation) Act, 1925, and to give examples of the earlier jurisdiction it is only necessary to refer to two or three cases quite shortly. The headnote to *Dunn* v. *Dunn* (1) reads as follows: "Where, "in a probate cause, the county court has jurisdiction, the "court may, though application be made in behalf of all

(1) (1860) 1 S. & T. 521.

1949

RACHEL THOMAS, DECD., IN THE ESTATE OF, DAVIES v. DAVIES.

Barnard J.

"the parties to the cause for it to be tried at the assizes, still, "in its discretion, direct it to be tried in the county court." It is clear in that case that the validity of a will was in dispute and that the will was being attacked on the ground that it was not the will of the deceased, that it was not duly executed, and that the deceased was not of sound mind at the time of its execution. Sir Cresswell Cresswell on an application to direct the issue to be tried at the assize stated (1): "The "personal property may not amount to more than 200*l*. "If so, the cause would properly come under the jurisdiction "of the county court." Further down he says (2): "Although "the parties may apply for a cause to be tried at the assize, "I may still consider it a proper one to send to the county "court. Before I make any order, an affidavit must be "brought in, showing the amount of the deceased's personal "property." It so turned out in that particular case when the affidavit was brought in that the estate was above the amount which gave the county court jurisdiction and the matter was therefore sent to the assizes.

There is another decision of Sir Cresswell Cresswell in *Norris* v. *Allen* (3) of which the headnote reads: "When "the judge of the Court of Probate is satisfied that the county "court has jurisdiction, he will direct a cause to be tried "before the judge of a county court having jurisdiction, "and will also direct the papers in the cause to be transmitted "to the county court for the purposes of the suit; but he will "give no directions as to the mode in which the cause shall "be tried. It will be for the judge of the county court to "decide whether the cause shall be tried before him with or "without a jury." The plaintiff in that case was propounding a codicil and the defendant, who was a legatee under the will and adversely affected by the validity of the codicil, pleaded several things thereto upon which issue was joined. Sir Cresswell Cresswell in a short judgment stated (4): "You should apply "to the judge of the county court to direct the mode in "which the cause is to be tried. I cannot give directions "for the cause to be tried in any particular manner. I shall "only direct that it be tried before the judge of the county "court of Northamptonshire, and leave him to decide whether "it shall be tried with or without a jury; and I will also direct "the papers in the cause to be transmitted to the county "court."

(1) 1 S. &. T. 521.
(2) Ibid.
(3) (1862) 2 S. &. T. 601.
(4) Ibid. 602.

It is necessary to see how the relevant sections of the Court of Probate Acts, 1857 and 1858, were affected by the Supreme Court of Judicature (Consolidation) Act, 1925. That Act was in substance a consolidating Act, and s. 150, sub-ss. (*a*) and (*b*) substantially replaced s. 59 of the Court of Probate Act, 1857, and s. 10 of the Court of Probate Act, 1858. The really vital words which clothe the county court with jurisdiction are to be found in s. 10 of the Act of 1858. I do not propose to read the whole of s. 10, but only the very end of the section where the material passage appears. "The "judge of the county court having jurisdiction in the place "in which the deceased had at the time of his or her death "a fixed place of abode shall have the contentious jurisdiction "and authority of the Court of Probate in respect of questions "as to the grant and revocation of probate of the will or "letter of administration of the effects of such deceased "person, in case there be any contention in relation thereto." Those words are replaced by these words in sub-s. (*b*) of s. 150 of the Supreme Court of Judicature (Consolidation) Act, 1925. "The judge of the county court having jurisdiction "in the place of abode of the deceased shall have the "jurisdiction of the High Court in respect of any contentious "matter arising in connexion with the said grant or "revocation." I can see no difference whatsoever in the meaning of those two passages. I am quite satisfied that if the legislature at that time—and this equally applies when I come to deal with the later Act, the County Courts Act, 1934—had any intention whatsoever of depriving the county court of the jurisdiction which it had had all those years it would have said so specifically.

The County Courts Act, 1934, s. 60, sub-s. 1 and s. 61 replaced sub-ss. (*a*) and (*b*) of s. 150 of the Supreme Court of Judicature (Consolidation) Act, 1925. Section 60, sub-s. 1, of the County Courts Act, 1934, is word for word the same as s. 150, sub-s. (*b*), of the Supreme Court of Judicature (Consolidation) Act, 1925.

If there is any doubt at all as to what the word "contentious" means (and I assume that it meant the same in 1858 as it did in 1925 and 1934 and does to-day), it is shown very clearly by the judgment of Sir James Wilde in a case to which I have been referred: *Zealley* v. *Veryard and Bridle* (1). As Mr. Simon on behalf of the defendants pointed out, this was only one ,

---

(1) (1866) L. R. 1 P. & M. 195.

1949

RACHEL THOMAS, DECD., IN THE ESTATE OF.

DAVIES v. DAVIES.

Barnard J.

example of a probate action which was undoubtedly tried by the county court, but in that case Sir James Wilde says (1): "In cases within the jurisdiction of a county court, it is "competent to the party applying for a grant, or for the "revocation of a grant, to go at once to the county court, "or if the suit has been commenced in this court, to apply "under the fifty-ninth section to have the cause sent to the "county court." And Sir James then quotes from the section: "And where 'it is shown to the Court of Probate that the state "'of the property and the place of the abode of the deceased "'were such as to give contentious jurisdiction to the judge "'of a county court, the Court of Probate may send the cause "'to such county court, and the judge thereof shall proceed "'thereon as if such application and cause had been made to "'and arisen in his court in the first instance'."

I do not think that the position is any different to-day from what it was in 1857 when the Court of Probate came into existence. Provided you bring the cause within the statute, that is to say, as to the value of the estate and the place of abode of the deceased, the county court has jurisdiction and I think it is very right and proper that it should have such jurisdiction. The county court only deals with estates which are of small value, and it would be putting an intolerable burden on the parties to compel them in those circumstances to litigate in the High Court. I shall therefore make an order directing this cause to be transferred to the county court at Aberdare and directing that the necessary papers in the cause should be sent to the county court judge at Aberdare.

Solicitors: *Theodore Goddard & Co., for Williams, Thomas & Williams, Aberdare; Rider, Heaton, Meredith & Mills for Marchant Harries & Co., Aberdare.*

(1) L. R. 1 P. & M. 195, 197.

J. B. G.

FAIRMAN *v.* FAIRMAN.

1949
Mar. 23

Lord Merriman P. and Ormerod J.

Divorce—Evidence—Adultery—Uncorroborated evidence of "accomplice."

When a witness gives evidence in matrimonial proceedings that he or she has committed adultery with a party to those proceedings, that evidence must be treated with the same circumspection as the evidence of an accomplice in the criminal courts.

Ginesi v. *Ginesi* [1948] P. 179 applied; *Statham* v. *Statham* [1929] P. 131, 150; and *Rex* v. *Tate* [1908] 2 K. B. 680, 682, followed: *Spring* v. *Spring and Jiggins* [1947] 1 All E. R. 886, 887, disapproved.

WIFE'S APPEAL to the Divisional Court.

On April 16, 1942, the justices for the petty sessional division of Gore, sitting at Wealdstone in the county of Middlesex, made an order for maintenance in the appellant's favour on the ground of her husband's desertion. On November 2, 1948, the respondent was granted a summons to discharge the order on the ground that since the making thereof the appellant had committed acts of adultery with one Albert Warner. The case was heard at Wealdstone, on December 15, 1948, when the order for maintenance of April, 1942, was discharged.

At the hearing the only evidence as to the adultery was that given by the said Albert Warner, who said that he had been a lodger at the appellant's house and had committed adultery with her on frequent occasions. The appellant denied the accusation. The justices found the charge proved and gave as their reasons for the discharge of the order: "That they were satisfied on the evidence that the wife "committed acts of adultery with Albert Warner on frequent "occasions between 1943 and 1946." Among the grounds of appeal were (*a*) "That the evidence of Albert Warner, "an accomplice, was entirely uncorroborated"; (*b*) "That "the justices failed to direct their minds to the standard "of proof needed in a charge of adultery and to the danger "of accepting and relying on the evidence of one uncorroborated "witness."

Stuart Horner for the appellant. When adultery is alleged the standard of proof required is the same as that required in criminal cases—see *Churchman* v. *Churchman* (1) and

---

(1) [1945] P. 44, 51.

Ginesi v. *Ginesi* (1); and if the only evidence before the court is that of an accomplice his evidence must be considered with the same caution as a jury would be instructed to consider it in a criminal case. See *Rex* v. *Tate* (2), *Rex* v. *Baskerville* (3), and the reference in the second case to *Rex* v. *Willis* (4).

[The President referred to *Statham* v. *Statham* (5), and to the reference in that case to *Rex* v. *Baskerville* (3).]

There is no corroboration whatever here of Warner's evidence that he and the appellant had committed adultery; and there is no reference either in the notes of evidence or in the justices' reasons to show that the justices had considered this aspect of the matter, although their attention had been drawn to it by the appellant's solicitor.

F. J. Cridlan for the respondent. Adultery remains a quasi-criminal matter and the strict rules of evidence in the criminal courts do not apply. Corroboration of evidence of alleged adultery which has been given by one of the parties thereto against the other is not essential: see *Spring* v. *Spring and Jiggins* (6).

LORD MERRIMAN P. There are two main lines upon which adultery is sought to be proved. The first class of case is where there is no direct evidence of the commission of the offence, but it is sought to prove it circumstantially, by inference from the existence of a guilty affection coupled with opportunity. If there had been anything really worth considering in this case in the nature of evidence of guilty affection to couple with the evidence of the opportunity afforded by the relationship of landlady and lodger, the case might conceivably have been presented in a different form, but it was not that class of case. It was one of the other group of cases, where it was sought to convince the court by direct evidence of the offence. That evidence was given by one who was in the nature of things, an accomplice, the man, that is, with whom it was alleged that the wife had committed adultery. Only two witnesses were called, that man and the wife. The man swore that over a period of three years, which ended in 1946, he and the wife had habitually committed adultery in his bedroom at the house in question. The wife denied on oath that she

(1) [1948] P. 179.
(2) [1908] 2 K. B. 680.
(3) [1916] 2 K. B. 658.
(4) [1916] 1 K. B. 933.
(5) [1929] P. 131.
(6) [1947] 1 All E. R. 886.

had ever committed adultery with him and she said that his evidence was absolutely false.

[His Lordship referred to certain matters with which this report is not directly concerned and continued :] I have said enough to make it apparent that the real crux of this case is that the finding of adultery against this woman depended upon the evidence of Warner and on his evidence alone; and his evidence is plainly that of an accomplice. How does the law stand on that basis and as applied to the facts of this particular case? About that there really is no doubt. I am not going to multiply citations from authorities, nor examine in detail, for example, the case of *The King* v. *Baskerville* (1) where all the authorities were fully reviewed. For my purpose and for the purposes of this jurisdiction it is, I think, necessary only to refer to two cases: the decision, first of all, of the Court of Appeal in *Statham* v. *Statham* (2), and secondly, their decision in *Ginesi* v. *Ginesi* (3), bearing in mind that although the Court of Appeal were dealing in *Statham* v. *Statham* (2) with a matrimonial offence, they were dealing with a question of sodomy which, in addition to being a matrimonial offence, is also a criminal offence. In that case, Russell L.J. called attention to the fact that there was no evidence of the commission of the offence except the statement of the wife, and continued (4): "The offence of sodomy "is an offence of so serious a nature that a rule has grown "up, that in criminal trials for certain offences (which include "sodomy) the judge must warn the jury of the seriousness "of convicting, in the absence of some evidence to corroborate "the story of the other party to the act alleged. If no such "warning has been given a conviction will be quashed. "Notwithstanding the warning the jury may convict—but "the warning must be given or the conviction will not stand." He then says: "Is this rule to be confined to criminal trials "for the offence? I can see no reason why it should be so "confined."

That brings me to *Ginesi* v. *Ginesi* (3) in which the Court of Appeal examined a dictum of my own (indeed, I think it is more than a dictum) in the judgment of the Court of Appeal which I delivered (it was a written and reserved judgment of the whole court) in *Churchman* v. *Churchman* (5).

---

(1) [1916] 2 K. B. 658.
(2) [1929] P. 131.
(3) [1948] P. 179.
(4) [1929] P. 130, 150.
(5) [1945] P. 44, 51.

We were dealing with the onus of proof in relation to the allegation that a husband had connived at his wife's adultery. Manifestly, as the Court of Appeal recognized both in that case and in *Ginesi* v. *Ginesi* (1), the same sort of principles apply to the allegation of connivance of the offence of adultery as to the offence of adultery itself. I am reported to have said in *Churchman* v. *Churchman* (2): "The same strict proof is required in the case of a matrimonial "offence as is required in connexion with criminal offences "properly so-called." In *Ginesi* v. *Ginesi* (1) the Court of Appeal unreservedly approved that observation in relation to a charge of adultery, in addition, of course (as Wrottesley L.J. expressly observed at p. 186), to the connivance; while it left open the question whether the current generality of the observation applied to other matrimonial offences.

Although perhaps it does not arise in the present connexion, I would like to add a footnote to the phrase which I then employed, and say that from the beginning of my tenure of this office I have always directed juries and directed myself in the same terms where there was a charge of adultery. I did so on the basis that adultery was a quasi-criminal offence, and that, therefore, the same principles should be applied to that charge as in the case of criminal offences properly so called: I am not conscious, however, that I have ever directed either myself or a jury that the same strictness applies to other matrimonial offences, such as desertion or cruelty, or, for that matter, wilful neglect to provide reasonable maintenance, although there should be a direction that the onus lies upon the spouse who makes the charge to satisfy the court that the offence is proved. I say that merely by way of parenthesis, because the precise measure of proof in other matrimonial offences is no more in question here than it was in either *Churchman* v. *Churchman* (2) or *Ginesi* v. *Ginesi* (1), and, needless to say, I am prepared to leave the subject precisely where it was left by the learned Lords Justices who decided the case of *Ginesi* v. *Ginesi* (1).

It is not enough in a case of this nature merely to say: "Here is a witness on one side, here is a witness on the other. "Which do we prefer?" I cannot see, I am bound to confess, any trace of a direction by these justices to themselves in the terms summarized by Russell L.J. in the passage which I have read from *Statham* v. *Statham* (3).

(1) [1948] P. 179.
(2) [1945] P. 44, 51.
(3) [1929] P. 131.

I am afraid that the matter does not end there. In spite of the fact that we have been concentrating the argument throughout on both sides on the necessity for a proper direction by the justices to themselves in this particular, in the course of the argument, it has been suggested to us by counsel for the husband, more than once, that the justices who saw and heard the witnesses had preferred the evidence of the man to that of the wife. That will not do. That will not do on the authority of the House of Lords in *Thomas* (*or Watt*) v. *Thomas* (1), or in the *s.s. Hontestroom* case (2) twenty years earlier, on which their Lordships' direction to appellate tribunals was based, for it is common to both those pronouncements of the House of Lords that there has been a proper direction, or, putting it the other way, that there has been no misdirection of the court to itself. I am bound to say that I feel very little doubt that the argument so powerfully addressed to us here by Mr. Cridlan: "There is the wife on the one hand "and there is this man on the other; which of the two do "you believe?" was the argument which prevailed with the justices; and that will not do.

I come back to one of the cases which is the foundation of the judgment in *Rex* v. *Baskerville* (3), which was expressly approved in *Statham* v. *Statham* (4) and which is implicit in the passage which I have read from Russell L.J.'s judgment. That case is the decision of the Court of Criminal Appeal in *Rex* v. *Tate* (5) in which Lord Alverstone C.J. said (6): "In the "present case the judge did not direct the jury in accordance "with the settled practice, but told them that the question "for them was which of the two witnesses they believed, "the boy or the prisoner, thereby leading them to suppose "that if they believed the accomplice's story they might "properly convict, although his evidence was entirely without "corroboration." In my opinion there is no escape from the conclusion that that is what has happened here, or, at least, I am not satisfied that that is not what has happened here, and in those circumstances, in my opinion, this finding cannot stand.

We have been referred to the judgment of Wallington J. in *Spring* v. *Spring and Jiggins* (7). That was a case in which

---

(1) [1947] A. C. 484.
(2) [1927] A. C. 37.
(3) [1916] 2 K. B. 658.
(4) [1929] P. 130.
(5) [1908] 2 K. B. 680.
(6) Ibid. 682.
(7) [1947] 1 All E. R. 886.

1949

FAIRMAN
v.
FAIRMAN

Lord Merriman P.

the only evidence of adultery against the co-respondent was that of the wife. It is a judgment dealing with that aspect of the matter, so far as the report goes. The report itself shows plainly that the learned judge had gone very carefully into the evidence of adultery although there is no report at all of that evidence; but the learned judge is reported to have said this (1): "Counsel has argued that there ought to be "corroboration, but corroboration of what? It can only "mean corroboration of the wife's testimony. It cannot "mean that, if she is believed, the court cannot draw the "irresistible inference from that that it involves necessarily "adultery by the co-respondent with the wife. In my view, "corroboration in such circumstances is not called for. If it "is called for, there is abundant corroboration in the whole "of the circumstances of this case." I have no criticism whatever to offer with regard to the last sentence, and if the evidence (which, as I say, is not reported at all) did afford abundant corroboration of the wife's evidence as against the co-respondent, then it follows necessarily that the observation that corroboration in such circumstances is not called for was merely an obiter dictum. But, whether it is an obiter dictum or was necessary to the decision of the case, I feel bound to say that, in my view, a statement that corroboration in such circumstances is not called for cannot stand in view of the decision of the Court of Appeal in *Ginesi* v. *Ginesi* (2), to which reference has already been made.

[His Lordship then dealt with the course which the court had decided to take and said:] Our duty in this case is to set aside the finding of adultery and the order discharging the original order in favour of the wife upon that ground, and to remit the husband's summons for such an order to a different panel of justices for the same petty sessional division for rehearing, if the husband is minded to demand a rehearing.

ORMEROD J. I agree, and have nothing to add to the judgment of my Lord.

Appeal allowed.

Solicitors: *Pierron & Morley, Wealdstone, Middlesex; Shaen, Roscoe & Co.*

(1) [1947] 1 All E. R. 886, 887.

(2) [1948] P. 179.

J. B. G.

ORR-LEWIS *v.* ORR-LEWIS.

1949
Feb. 16.
Willmer J.

Divorce—Practice—Injunction to restrain divorce proceedings in foreign court—Jurisdiction so to do—Rare exercise of such jurisdiction.

The court has jurisdiction to restrain by injunction a party seeking to pursue a matrimonial suit in a foreign country; but it is a jurisdiction which is only to be exercised with great caution and upon the court being satisfied that the continued prosecution of the foreign suit would be oppressive or vexatious in the circumstances and liable to cause serious if not irreparable damage to the applicant.

SUMMONS in open court.

By her petition for divorce on the ground of her husband's cruelty, Lady Orr-Lewis sought dissolution of her marriage with Sir John Duncan Orr-Lewis. The petition was filed in 1947, but the respondent objected to the jurisdiction and alleged that he was domiciled in France.

In June, 1948, Willmer J. held that the respondent was domiciled in England and that the English court therefore had jurisdiction to hear the wife's petition. His decision was upheld by the Court of Appeal in November, 1948.

The respondent, however, had by then instituted proceedings for divorce in France on the ground that he had been deserted by his wife; and although he had given an undertaking to the court in July, 1948, not to pursue those proceedings until the Court of Appeal should have heard his appeal from Willmer J. on the question of domicile, he had refused to give a similar undertaking after his appeal to the Court of Appeal had been dismissed.

The petitioner thereon applied by summons for an injunction to restrain the respondent from pursuing the French suit, and it was intimated by her counsel at the hearing of the motion that an injunction until such time as the English suit should be heard would satisfy the petitioner's present application.

No notice had been received that a date had been fixed for the French proceedings.

Geoffrey Lawrence for the petitioner referred to *McHenry* v. *Lewis* (1); *The Christiansborg* (2); *Christian* v. *Christian* (3);

(1) (1882) 22 Ch. D. 397.
(2) (1885) 10 P. D. 141.
(3) (1897) 67 L. J. (P.) 18.

1949

ORR-LEWIS
v.
ORR-LEWIS.

and *Cohen* v. *Rothfield* (1), and submitted that in the circumstances of this case the burden which lay on the plaintiff to show that the French proceedings were vexatious and oppressive had been discharged.

Percy Hollins for the respondent.

WILLMER J. (after stating the facts): The question which I have to determine is: should there or should there not be an injunction to restrain the respondent from pursuing the French suit until such time as the suit in this country is tried? I have to ask myself: what is the damage that will ensue during that limited time if I do not grant the relief which is asked for now?

It is now settled that the court will be very slow in such a situation to impose an injunction upon any party seeking to proceed in a foreign country. The most recent pronouncement on the subject to which I have been referred is the decision of the Court of Appeal in *Cohen* v. *Rothfield* (1). That was a civil action; but in the course of it the authorities were reviewed, and consideration given both to cases in which the same plaintiff was pursuing a remedy in two countries, and to cases in which a plaintiff in one country was defendant in another country. The matter was summed up by Scrutton L.J. in these words (2): "Where it is proposed "to stay an action on the ground that another is pending, "and the action to be stayed is not in the court asked to make "the order, the same result is obtained by restraining the "person who is bringing the second action from proceeding "with it. But, as the effect is to interfere with proceedings "in another jurisdiction, this power should be exercised "with great caution to avoid even the appearance of undue "interference with another court." Eve J. who delivered a judgment to the same effect, said this (3): "The question "then arises in what circumstances and upon what principle "does the court act in exercising this jurisdiction in cases "where, as in this case, it is invoked on the ground that "another action between the same parties and for substantially "the same relief is already instituted. Broadly speaking, "I think the answer is that the court will exercise the "jurisdiction where the circumstances are such as to satisfy "it that continued prosecution of both actions would be "oppressive or vexatious."

---

(1) [1919] 1 K. B. 410.

(2) Ibid. 413.

(3) Ibid. 417.

That is to say, it is a jurisdiction which I have; but it is one which I am not to exercise except with great caution on being satisfied that the continued prosecution of the French suit would, in the circumstances, be oppressive or vexatious, and, I should add, would cause serious if not irreparable damage to the petitioner to whom in this instance I am asked to grant this relief.

In the course of *Cohen* v. *Rothfield* (1), Scrutton L.J. drew a distinction (2) between the cases in which the same plaintiff is suing in two jurisdictions and those in which the plaintiff in one country is the defendant in another, and he made it clear that in the latter case the necessity for avoiding undue interference was even stronger than in the former case. In fact, he raised a question which had twice previously been raised in similar cases, namely, whether there was any case in which such an order had ever been made. In reply to that inquiry he was referred to the old case of *Bushby* v. *Munday, Cloves and Cracroft* (3) which was decided in 1821, and in which, apparently, an order had been made where a plaintiff in this country was defendant in another country. But apart from that one case in 1821 no such order had been made up to 1918, when *Cohen* v. *Rothfield* (1) was decided; and I am informed by counsel to-day that their researches have not revealed any case in which such an order has been made in the last thirty years. I approach this case, therefore, with some degree of caution when I am asked to exercise this very unusual jurisdiction.

In my judgment no sufficient case has been made out for making the order that I am asked to make. It appears to me that the course which the petitioner and her advisers have taken is misconceived. After she had obtained the judgment of the Court of Appeal I should have thought that the next step for her to take was to set the case down for trial. Had that been done, in early November, 1948, it is not beyond the bounds of possibility that by to-day we might have been trying the suit instead of discussing the question of what should be done about the French proceedings. Even as it is, there is no evidence before me that any step in the French proceedings is being even contemplated in the immediate or foreseeable future, and I see no reason why this case, if it is set down at once, should not be tried and disposed of long before the French proceedings come to fruition.

---

(1) [1919] 1 K. B. 410.
(2) Ibid. 414.
(3) (1821) 5 Madd. 297.

I therefore find that the petitioner is very far from proving that in the circumstances of this case it would be oppressive or vexatious to allow the French proceedings to proceed, or that a case has been made out for interfering with the right of a party to proceed in a foreign jurisdiction. Bearing in mind the caution in such matters which has been enjoined on the court, I feel that I can only decline to make the order asked for. The application will, therefore, be dismissed.

Application dismissed with costs.

Solicitors: *Gordon, Dadds & Co.; Roney & Co.*

J. B. G.

1949
Feb. 8.
Wallington J.

WALSHAM *v.* WALSHAM.

Divorce—Cruelty—Refusal of normal sexual relations.

Almost from the outset of the married life a husband practised coitus interruptus despite the repeated protests of his wife and regardless of the fact that he knew that his conduct was increasingly injurious to her bodily and mental health. On a petition by the wife for a divorce:—

Held, that the respondent husband had in the circumstances of the case been guilty of cruelty. Although in the opinion of the court a mere abstention from sexual intercourse could not amount to cruelty, the bodily and mental health of women such as the petitioner, who had entered into matrimony hoping to fulfil what was one of its most important functions, namely the bearing of children, was likely to be affected when the normal means of child-bearing was denied them and when their sexual functions were abused by coitus interruptus, especially if that practice followed substantial periods of a complete denial of intercourse.

WIFE'S petition for divorce on the ground of cruelty.

The parties were married in 1929. On July 14, 1948, Finnemore J. dismissed a petition presented by the wife for a decree of nullity on the ground of the respondent husband's incapacity or, in the alternative, of his wilful refusal, to consummate the marriage. His Lordship was not satisfied that the marriage had never been consummated. The present petition was filed later in 1948: it included allegations that the respondent had habitually and wilfully refused to have complete sexual intercourse with the petitioner and that for long periods the respondent refused to have any intercourse with her at all.

The husband by his answer denied the allegations of cruelty; but although he was represented at the hearing he did not deny the evidence given by the petitioner and did not defend the case.

F. H. Lawton for the petitioner.
Stephen Murray for the respondent.

WALLINGTON J.: This is an unusual case. It is one in which the petitioning wife asks for a decree of divorce on the ground of cruelty alleged by her to have been inflicted upon her by her husband in the course of the married life. The answer is a denial, but, for reasons which seemed to the respondent to be good, his counsel has not cross-examined the petitioner or the doctor who attended her in 1939 and 1940.

Although it appears from the petition that there were some disputes between the parties as to the cost of maintaining the matrimonial home, the cruelty relied upon has now been limited before me to failure on the part of the respondent (failure consistent only with determination on his part), properly to give to the petitioning wife those sexual rights to which she as his wife was entitled, with the result that over the course of years her health suffered and deteriorated and at one time at all events was in a serious condition.

The case has a judicial history in that on July 14, 1948, Finnemore J. had before him a petition by the present petitioner asking in the first instance for a nullity decree on the ground of the respondent husband's sexual incompetence. At the hearing the learned judge allowed an amendment of the petition by adding an alternative prayer for a nullity decree on the ground of wilful refusal by the husband to consummate the marriage. The trial of the petition proceeded on that basis and the learned judge ultimately decided against the petitioner on the ground that the evidence adduced did not satisfy him that the marriage had not been consummated.

The facts in this case are most extraordinary. The respondent almost from the outset of the married life developed and continued the habit of partial intercourse by means of coitus interruptus despite the repeated protests of the petitioner and regardless of the fact that he knew that his conduct in this regard was increasingly injurious to the bodily and mental health of his wife. Mere abstention by the husband from intercourse could not, in my view, amount to cruelty, even though it might injure her health. The husband in this case, however, did much more than abstain: he refrained from sexual intercourse for varying periods and followed such periods with numbers of occasions when he had partial intercourse. On each of these occasions the wife genuinely hoped and believed that the intercourse would be complete and that she would have the opportunity, or, at least, the possibility, of bearing children, and on each occasion she was frustrated, disappointed and depressed, and her nervous system was disturbed, with the result that her health, bodily and mental, increasingly suffered, for she was very desirous of raising a family—a desire that she was justified in believing that her husband shared.

I watched the petitioner in the witness-box with care, and I was satisfied of her complete honesty, veracity and accuracy. From her testimony, and from the evidence of her doctor, I do not doubt that the conduct of the husband had and continued to produce a highly prejudicial effect upon the health as well as the happiness of his wife and that, if continued, it would have again produced a serious and dangerous deterioration in her health. I entertain no doubt that the respondent was told on many occasions by the petitioner, and once by the doctor, of her unhappiness and the deterioration in her health and of their causes—and that he must have understood the wrong and injury that he was doing to his wife.

I am not supposing, for a moment, that her whole well-being depended upon sexual intercourse or that she thought it did. Some women, however, may be so constituted that their health is not affected by repeated partial intercourse, such as coitus interruptus, while other women—perhaps of a more normal constitution and outlook—enter into the marriage state hoping to fulfil the main function, or at least one of the most important functions of matrimony, viz., the bearing of children. When the latter class of women are denied the normal means of child bearing and their sexual functions are abused by frequent coitus interruptus, especially when it follows substantial periods of complete denial of intercourse, their health (both bodily and mental) is likely to be affected.

In my opinion the present case falls within the latter category. I am quite satisfied by the wife's evidence that the husband's conduct was such as he was determined to follow, and in fact followed, regardless of what he knew would be the injurious consequences and regardless, also, of her repeated protests and requests that intercourse should be normal and proper. He has, therefore, been guilty of cruelty within the accepted definition of that expression as applied to cases of alleged cruelty in these courts. I accordingly grant a decree.

Solicitor: *C. Grobel & Son; Harold Miller & Fraser*, for *Weigall & Inch*, Margate, Kent.

J. B. G.

C. A.

1949
May 13.

Bucknill and Denning L.JJ. and Vaisey J.

IN THE MATTER OF A PROPOSED PETITION.

BOWMAN *v.* BOWMAN.

Divorce—Application for leave to present petition within three years of marriage—Exceptional hardship suffered by applicant—Exceptional depravity on part of proposed respondent—Instances of exceptional hardship or depravity—Matrimonial Causes Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 1.

Where application is made to present a petition for divorce within three years of marriage, depraved conduct (sworn to by affidavit) on the part of the proposed respondent may be evidence of "exceptional hardship" suffered by the applicant within the meaning of s. 1 of the Matrimonial Causes Act, 1937.

Observations by Denning L.J. on cases of "exceptional hardship "suffered by the petitioner or exceptional depravity on the part "of the respondent" within the meaning of the section.

APPEAL from a decision of His Honour Judge Norris, sitting as a special commissioner in divorce, granting leave to an applicant to present a petition for divorce within three years of marriage.

The husband, aged thirty-five, who had been married before, and his wife, aged twenty-eight, were married in July, 1947, and there were no children of the marriage. In August, 1947, some six weeks after the marriage the wife left their home and in April of this year applied for leave to present her petition on the ground of her husband's adultery, alleging exceptional hardship suffered by herself and exceptional depravity on the part of her husband (1). By her affidavit in support of her application twenty-one of the twenty-three paragraphs dealt with the conduct of her husband, whilst they were living together. In the other two paragraphs she stated that a witness to the alleged adultery, a woman who would be named, was about to go abroad and unless she obtained her evidence whilst she was in this country she would suffer exceptional hardship. At the hearing of the application, counsel for the husband asked for an adjournment on the ground that it was not shown that the husband had had five clear days' notice of the hearing of the application pursuant to r. 2, sub-r. 4, and r. 8, sub-r. 1 (*b*) and sub-r. 2 of the Matrimonial Causes Rules, 1947. There was proof of the sending of the notice by registered post on April 11, 1948, for the hearing on April 20, but there was no proof of the date of the receipt of the notice. Counsel for the husband being present, the commissioner refused to adjourn the case. He granted the application not on the ground of exceptional depravity on the part of the husband, but on the ground of exceptional hardship suffered by the wife. The husband appealed.

---

(1) Matrimonial Causes Act, 1937, s. 1: "No petition for divorce "shall be presented to the High "Court unless at the date of the "presentation of the petition "three years have passed since the "date of the marriage: Provided "that a judge of the High Court "may, upon application being "made to him in accordance with "rules of court, allow a petition "to be presented before three "years have passed on the ground "that the case is one of excep-"tional hardship suffered by the "petitioner or of exceptional "depravity on the part of the "respondent . . . ."

By para. 14 of the Second Interim Report of the Committee on Procedure in Matrimonial Causes, 1946 (Cmd. 6945), presided over by Denning L.J. under the heading Procedural Reforms:— "The Rules of Court also provide "that the judge shall hear these "applications 'in chambers.' This "means that the proceedings are "in private and the decisions are "not reported, with the result "that there is no guidance avail-"able to litigants as to what is "considered to be 'exceptional "'hardship' suffered by the "petitioner or 'exceptional "'depravity' on the part of the "respondent; and indeed the "views of one judge on the point "may differ from those of another. "It is important that this juris-"diction should be exercised on "uniform and settled lines. This "can be done if the rule is modified "so as to permit the Judge to give "his reasons in open court, if he "should think proper without "the names of the parties being "mentioned."

C. A.

1949

In the Matter of a Proposed Petition.

Bowman v. Bowman.

William Phillips for the husband. This application was granted on the ground that the case was one of exceptional hardship "suffered" by the wife: the verb is in the past tense. But the only evidence put forward by the wife was of alleged exceptional hardship which might be suffered in the future.

Fairweather for the wife. In the evidence put forward by the wife of exceptional depravity on the part of the husband, there was abundant testimony of exceptional hardship "suffered" by the wife.

Bucknill L.J. It is now clear from the correspondence that the husband had five clear days' notice of the application, by way of originating summons, before the return day on April 20, 1948, and, therefore, that there was no substance in the application for adjournment of the summons. To deal with the merits, counsel for the husband has contended that it is clear that the commissioner did not grant the application on the ground of exceptional depravity on the part of the husband. He has pointed out that in the affidavit of the wife supporting the application all but two of the twenty-three paragraphs deal with the alleged depravity of the husband whereas the ground on which the commissioner appears to have acted was that the wife desired to call a witness to prove the adultery who was about to go abroad in June, 1949, and who by reason of s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925, would be in a position to refuse to give such evidence. Once she had left the country, it was contended for the wife, it might be impossible to prove the adultery. Of course, it might be possible to take her evidence on commission and, if that matter stood alone, I cannot see that it was an exceptional hardship suffered by the wife that she might not be able to get this evidence before the court at an earlier date. But I think I may assume that the commissioner in coming to his conclusion took into consideration the facts alleged as to the conduct of the husband in the other twenty-one paragraphs of the wife's affidavit. If they were true, I think it would be an exceptional hardship on the wife that this marriage should be kept in being for the three years. There was for instance the incident alleged in the motor car, and another incident when the husband is alleged to have said to his wife: "If I can get my hands "on you I will murder you." This conduct of the husband during the first six weeks of marriage must be material on the issue whether extraordinary hardship was suffered by the wife. There is no reason to think that the commissioner exercised his discretion wrongly and I think the appeal should be dismissed.

Denning L.J. This case raises the question: In what circumstances ought leave to be given to a spouse to bring a petition for divorce within three years of the marriage? By s. 1 of the Matrimonial Causes Act, 1937, that leave can only be granted on the ground of exceptional hardship suffered by the would-be petitioner or of exceptional depravity on the part of the proposed respondent. The answer to the question depends on the use of the word "exceptional." The case put forward by the applicant must disclose "exceptional" depravity on the part of the other spouse or "exceptional" hardship suffered by the applicant. This involves an inquiry into the degree of depravity alleged or the degree of hardship said to be suffered—an inquiry which, it is plain, may prove to be a difficult task and it is not surprising that different judges have interpreted this provision of s. 1 in different ways.

The only cases in which the question arises are, of course, those of adultery or of cruelty. If there is nothing more than adultery with one other person within the first three years of marriage normally that may be considered ordinary depravity. There is, as a rule, I regret to say, nothing exceptional about that situation. Nor does that situation involve exceptional hardship on the innocent spouse, the applicant. The distress that it causes is one which many have to endure. But if the adultery is coupled with other matrimonial offences, e.g., if a husband not only commits adultery, but also deserts his wife in favour of another woman, or if he is cruel to her, thus causing her not only distress by his adultery but also injury by his violence, then even if his offence cannot be stigmatized as exceptional depravity on his part, nevertheless, it does involve exceptional hardship suffered by the wife. Even when the adultery is not coupled with desertion or cruelty, it may be committed in such aggravating circumstances as to show exceptional depravity. For instance the husband who commits adultery within a few weeks of marriage or who commits adultery promiscuously with more than one woman, or with his wife's sister, or with the maid in the house may probably be labelled as exceptionally depraved, and sometimes the consequences of adultery with one person may involve exceptional hardship to the applicant, as for instance when a wife as a result of her adultery has a child by another man, so that the husband, if he took back his wife would also have to maintain another man's child. These at all events are instances in which, when sitting in chambers, I have given leave to a spouse to present a petition for divorce within three years of marriage.

Cruelty again, by itself, is, I fear, not exceptional; but if it is coupled with aggravating circumstances, as for instance drunkenness and neglect, or if it is exceptionally brutal or dangerous to health, then even if it does not evidence exceptional depravity on the part of the proposed respondent, it does at least cause the applicant for the petition to suffer exceptional hardship. And, if it is coupled with perverted lust, it shows exceptional depravity on the part of the proposed respondent.

The really important consideration in all these cases is to see whether there is any chance of reconciliation. On this point, it is most material to inquire what the applicant has already done to try to make the marriage a success or to become reconciled. Is the breakdown of the marriage due to any failing or maladjustment on the part of the spouse who applies to launch her petition within three years of the marriage? Has the applicant consulted a probation officer or anyone else specially qualified to help? If the court is not satisfied that all which is reasonable has been done in this respect, it may well dismiss the application.

In this case, the wife, in her affidavit in support of her application charged her husband not only with adultery but with cruelty and perverted lust. She has consulted a psychiatrist about her husband. There is, it is clear, no chance of reconciliation. The learned judge has thought it a proper case in which to grant leave to present the petition within three years of the marriage and I do not see that he has gone wrong in principle. After all, if the wife was lying in her statements as to the grounds of the petition, they can be investigated at the hearing of the petition and the petition dismissed.

Vaisey J. I also agree that the appeal be dismissed.

Appeal dismissed.

Solicitors for the husband: *Collyer-Bristow & Co. for Band, Hatton & Co., Coventry.*

Solicitors for the wife: *Langhams & Letts for Philip Baker & Co., Birmingham.*

C. G. M.

1949
Mar. 1, 2, 3, 4.
Hodson J.

BATTLE *v.* ATTORNEY-GENERAL (BATTLE, G. L. AND BATTLE, A. F. INTERVENING).

Legitimacy declaration—Evidence—Declaration by deceased relative—Deceased declarant alleged to be natural grandfather of petitioner—Admissibility.

Presumption of paternity arising from marriage of alleged parents—Legitimacy Act, 1926 (16 & 17 *Geo.* 5, *c.* 60).

Costs awarded against intervener.

In a suit for a declaration of legitimacy the petitioner claimed that she was the natural child of Sidney Arthur Battle and Germaine Leonie Battle, and that she was legitimated by their subsequent marriage. Germaine Leonie Battle intervened in the suit and alleged that the petitioner was her daughter by another man Willis; and she tendered a declaration alleged to have been made by Willis's father, who had died before the proceedings were instituted, in support of her case.

Held, following *In the matter of Arthur Henry Davy* (*known as Robert Henry Davy*) [1935] P. 1, that this declaration was admissible evidence, even though, if accepted, that evidence would disclose no more than a blood relationship between the declarant and the petitioner and would tend to show that the petitioner was illegitimate.

Observations in *La Cloche* v. *La Cloche and, by revivor, La Cloche and the Viscount of Jersey* (1872) L. R. 4 P. C. 325, at p. 333, as to recognitions of paternity applied.

Petition for a declaration of legitimacy.

The petitioner Esmeralda Juanita Battle was born on March 29, 1927. By her petition she claimed that she was the natural child of Sidney Arthur Battle and Germaine Leonie Battle, that her parents were married on December 16, 1931, and that they were free to marry at the date of her birth.

Sidney Arthur Battle was killed in an accident in 1945 and died intestate; in October, 1946, a grant of letters of administration of his estate—stated to be some 15,000*l.*—was made to his father, Arthur Francis Battle and to his widow, the mother of the petitioner.

Arthur Francis Battle and Mrs. Battle were cited and both intervened in the suit; the former took no active part but indicated that he would abide by the judgment of the court; the latter denied that her husband was the father of the petitioner.

Shortly after her birth the petitioner was taken to live with a Mrs. Johns, then Mrs. Flanders, at an address in London; and she lived with her until 1938. Evidence was given by Mrs. Johns that both Mr. and Mrs. Battle frequently visited the child and that Mrs. Battle had said that Mr. Battle was the child's father. In order to avoid family complications the petitioner had continued to live with Mrs. Johns after Mr. and Mrs. Battle were married and until 1938. From 1938 to 1943 the petitioner lived with Mr. and Mrs. Battle, and they acknowledged her as their daughter; but in 1943 she returned to Mrs. Johns owing to her mother's violent temper. It was not until 1943, when she obtained a copy of her birth certificate, that she realized that she had been born before her mother's marriage.

Mrs. Battle gave evidence alleging that the petitioner's father was a Mr. Willis, and that she had visited Mr. Willis's father (since deceased) with the baby and received a money payment from him. She obtained leave to have the evidence of a Mr. Willis taken on commission in Australia, alleging that he could give evidence as to paternity. His evidence denied all knowledge of Mrs. Battle and was, in fact, eventually put in at the hearing by the petitioner.

R. Bush James K.C. and *William Latey* for the petitioner;
Colin Duncan for the Attorney-General;
H. S. Law for Mrs. Germaine Leonie Battle;
Ifor Lloyd for Arthur Battle.

Immediately prior to judgment, Hodson J. heard argument as to the admissibility of a statement alleged to have been made by Willis senior (since deceased) to a witness called by Mrs. Battle. The statement was relevant to the question whether Willis junior was the father of Mrs. Battle's child, and evidence thereof had been given at an earlier stage of the proceedings de bene esse.

1949

BATTLE v. ATTORNEY-GENERAL (BATTLE, G. L. AND BATTLE, A. F. INTERVENING).

Bush James K.C. objected to the admission of the statement by Willis senior, and submitted that such evidence was only admissible where a legal relationship to the deceased would be disclosed. As Willis junior had not married the petitioner's mother, Willis senior could be no more than a blood relation even if it were a fact that Willis junior was the natural father. *Law* referred to *In the matter of Arthur Henry Davy* (1).

[HODSON J. There were no statements tendered in that case which were not statements of legal relatives.]

The fact that Mrs. Battle did not marry Willis junior should not exclude evidence which would have been admissible if she had; to do so would be to exclude by a technicality evidence otherwise similar to evidence in favour of the petitioner which has already been admitted.

HODSON J. asked the Attorney-General for assistance as to the standard of proof required in legitimacy cases.

Duncan: There is very little authority except a Privy Council case from Jersey (*La Cloche* v. *La Cloche* (2)). Reports in which similar questions have arisen are all of cases heard before 1926, in which the legitimacy of children conceived before and born after marriage was being considered, e.g. *The Poulett Peerage Case* (3). Although overruled in *The Poulette Peerage Case* (3), *Anon* v. *Anon* (4) contains useful observations as to the presumption that a man admits a child born subsequent to the marriage to be his, if he takes no step to repudiate his paternity. When the child is born before marriage the question must be largely one of fact, although the petitioner must establish a prima facie case and discharge the normal burden of proof.

But useful assistance was to be gained from the principles laid down by the Privy Council in *La Cloche* v. *La Cloche* (2).

(*Cowan* (*otherwise Jouell*) v. *Cowan* (5) was also referred to.)

HODSON J.: It is often necessary in this class of case for parties to rely on the evidence contained in declarations made by deceased relatives, whether there is a contest or not; but before 1934 it was not settled whether declarations by deceased relatives made ante litem motam were admissible in legitimacy cases under the exceptions to the hearsay rule, which are

(1) [1935] P. 1.
(2) (1872) L. R. 4 P. C. 325.
(3) [1903] A. C. 395.
(4) (1856) 23 Beav. 273.
(5) [1935] P. 120.

usually described as the exceptions dealing with declarations as to pedigree. The Attorney-General, who is a necessary party to these cases, took the point before Langton J. in *In the matter of Arthur Henry Davy* (*known as Robert Henry Davy*) (1), that such declarations were not admissible because the petitioner, being illegitimate at birth, could not have any relatives until the facts which he sought to prove had been established. That argument was not accepted, and Langton J. admitted statements by members of the family, including the petitioner's supposed father, in support of the petition; and I have taken the same course in this case.

Some of the evidence which has been tendered on behalf of the intervener was of declarations made by the father of the man who is alleged by her to be the father of this child. That man is not the person alleged to be her father by the petitioner. It would be an injustice if the court excluded declarations of this nature on the footing that no possible legal relationship could be established, and the Attorney-General has not taken the point that these declarations ought to be excluded, although the objection was taken by counsel for the petitioner. However, having considered the judgment of Langton J. in *In the matter of Arthur Henry Davy* (1), I see no reason to take a technical view and to exclude declarations by a person who may be the grandfather by blood and nothing more, if the intervener's claim be established, while admitting the statements of a person who may, if the petitioner's claim succeeds, be the grandfather legally as well as by blood. Therefore I have admitted the declarations, whatever their weight may be, which have been put before the court on behalf of each party.

[His Lordship proceeded to review the evidence and continued :] The evidence is very strong that the petitioner was recognized as the child of Mr. Sidney Battle by Mr. Sidney Battle himself, and I invited counsel for the Attorney-General to assist me, if he could, as to the standard of proof which was requisite. Mr. Duncan referred me to an appeal heard by the Privy Council in 1872 from a decision of the Royal Court of Jersey, which dealt with the same question. The case was *La Cloche* v. *La Cloche* (2), in which James L.J. said (3): "The principle in all these cases is, that where a man marries "a woman who has had an illegitimate child, whether that

---

(1) [1935] P. 1.

(2) L. R. 4 P. C. 325.

(3) Ibid. 333.

1949

BATTLE
v.
ATTORNEY-GENERAL
(BATTLE, G. L. AND BATTLE, A. F. INTERVENING).

Hodson J.

"child is thenceforth to be considered the legitimate child "of the man must depend on the only evidence which can "generally be given of it; that is to say, the man's recognition "of his paternity—if that is sufficiently and abundantly "proved, it does not signify in what particular manner that "recognition is effected."

The question that was being discussed in that case was the absence of any formal recognition in any document. In this case there is abundant evidence of recognition by the father not only in the evidence of the petitioner herself, which I have no difficulty in accepting, but also in the other evidence.

[His Lordship considered that evidence and the evidence of the petitioner's mother, the first intervener, observing that there was no doubt that the mother herself had held out Sidney Battle as the father of her child. His Lordship concluded :] Rejecting as I do the evidence of the intervener, because I simply do not believe it, the evidence stands as it stood at the close of the petitioner's case, with such assistance as is given by the evidence of Mr. Battle senior. I am satisfied that the matters which the petitioner set out to prove are proved, that she was the child of Mr. and Mrs. Sidney Battle, and has been recognized as the child of Sidney Battle from the time of her birth right up to the year in which Mr. Sidney Battle died. That the marriage took place between her parents is itself a fact which points towards rather than away from that recognition, and I am satisfied that I should make the declaration asked for, that these two people were lawfully married—that is to say, that Sidney Arthur Battle and Germaine Leonie Battle were lawfully married on December 16, 1931, and that by the marriage the petitioner became legitimated as from that date.

An argument as to the matter of costs followed judgment, and reference was made to *In the matter of Arthur Henry Davy* (1), *Slingsby* v. *Slingsby* (2) (in the court of first instance), *Bain* v. *Attorney-General* (3), and the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 7.

HODSON J.: The petitioner must pay the costs of the Attorney-General. There will be no order as to costs either for or against Mr. Battle senior, but the petitioner will receive her costs from Mrs. Battle (the first intervener, namely the petitioner's mother), and will be entitled to recover as against her such costs as she has to pay to the Attorney-General.

---

(1) [1935] P. 1.
(2) (1915) 31 T. L. R. 246, 247.
(3) [1892] P. 261.

1949

BATTLE *v.* ATTORNEY-GENERAL (BATTLE, G. L. AND BATTLE, A. F. INTERVENING).

Solicitors: *T. D. Jones & Co. for Lyon Clark & Co., West Bromwich; Preston, Lane-Claypon & O'Kelly for Reynolds, Parry-Jones & Crawford, High Wycombe; Arthur Robson; The Treasury Solicitor.*

J. B. G.

DONALDSON (OR NICHOLS) *v.* DONALDSON (DONALDSON INTERVENING: NICHOLS CITED)

1949 *Jan.* 19.

Ormerod J.

Divorce—Domicile—English officer on active service abroad—Foreign domicile of choice acquired—Validity of American divorce.

A Royal Air Force officer was divorced by his first wife in Florida while he was stationed there on active service. The wife later petitioned for divorce in the English courts, alleging by her petition that the respondent had committed adultery with a woman with whom he had gone through a ceremony of marriage subsequent to the American decree. The respondent by his answer denied adultery, alleging that his marriage with the petitioner had already been dissolved. At the hearing of the suit:—

Held, that although the respondent had been on active service he had not been prevented thereby from acquiring a domicile of choice abroad; that he had acquired a domicile of choice in Florida at the time of the aforesaid decree; and that as that decree was therefore valid, there was in consequence no subsisting marriage between the petitioner and the respondent.

DEFENDED petition for divorce.

On June 7, 1944, the marriage between the parties was the subject of divorce proceedings in Florida, U.S.A. In those proceedings, as in the present, the wife was the petitioner and she was there granted a decree of divorce on the ground of mental cruelty. Both parties subsequently went through ceremonies of marriage, the husband in 1944, the wife in 1945.

The wife by her present petition alleged that the husband had lived and frequently committed adultery with the woman with whom he had gone through a ceremony of marriage, and she asked the court to exercise its discretion in her favour; the husband by his answer pleaded that the marriage had been lawfully dissolved, that at the date of the said dissolution both the petitioner and the respondent had been domiciled

1949

DONALDSON (OR NICHOLS) v. DONALDSON (DONALDSON INTERVENING: NICHOLS CITED).

in the State of Florida, and that he was lawfully married to the woman named in the petition. He pleaded in the alternative that if contrary to his contention he had committed adultery, then the petitioner had conduced to it as she was the petitioner in the divorce proceedings in Florida, and that if the marriage had not been dissolved as he contended that it had been, his wife had lived and committed adultery with the man with whom she had gone through a ceremony of marriage in 1945; and he asked for a decree in respect of that adultery.

There was no dispute as to the ceremonies of marriage subsequent to the Florida divorce proceedings; the matter therefore turned on the validity or otherwise of the Florida decree.

At the time of that decree the husband was a serving officer in the Royal Air Force and his wife (the present petitioner) had joined him in America. He was stationed in Florida and subject to recall to the United Kingdom or to posting elsewhere abroad in the normal way; and, indeed, within a short time of his decree and subsequent remarriage he was posted back to England, where he had remained and been joined by his second wife.

C. T. Salkeld Green for the petitioner.

Colin Duncan (*R. V. Cusack* with him) for the respondent. A domicile of choice can be acquired by a person in a country in which he happens to be serving on military or other duties: the essentials are the factum of residence, though temporary, and the intention there and then to acquire a domicile in that country and not only an intention so to acquire one in future—*Sellars* v. *Sellars* (1), *Bell* v. *Kennedy* (2). This respondent acquired a Floridan domicile and his divorce and re-marriage are valid according to English law.

ORMEROD J. (after referring to the circumstances leading to the American decree of divorce): The case resolves itself into a comparatively short point. If the parties were domiciled in Florida in June, 1944, the American decree was a valid decree and the marriage was dissolved then. If on the other hand the parties were not domiciled in Florida in June, 1944, it was not a valid decree, and the marriage still remains in being. The question, therefore, which I have to decide

(1) 1942 S. C. 206.

(2) (1868) L. R. 1 Sc. & D. 307.

is whether or not the parties were domiciled in Florida at that time.

The respondent gave evidence that he went to Florida in the course of his service duties, he took a great liking to the country, and arranged for his wife and children to join him there. He said that at that time he had no intention of leaving the Service, to which he was devoted, and that he intended to remain in it. But he also told me that when it became clear that his marriage was breaking up and that there would in all probability be a divorce, he considered from his knowledge of service conditions in peacetime that although he would probably be allowed to remain in the Service, he would have lost his chance of promotion. I am satisfied that view was genuinely formed by the respondent.

He came over to this country in the autumn of 1943 on service duties, and he had then made up his mind to give up the Service after the war and settle down in Florida. He was still determined to settle in Florida, when the time came, on his return there. He formed an attachment for an American girl, who made it clear that if he was going to marry her it would have to be on the understanding that he lived in America. He was anxious to marry her, and I am satisfied that this was a very strong factor in his decision to resign from the Service when the war was over and continue to reside in America and take up work there.

Counsel for the respondent must satisfy me that at the time of this divorce, which was in June, 1944, the respondent was not only residing in Florida but had made up his mind to reside there permanently and had thereby acquired a domicile of choice. The fact that his service duties would take him away from Florida for some considerable time—probably so long as he was serving—would not as I see it affect the matter so long as he was then living in Florida and had determined to continue to live there when he could; and I am satisfied having heard his evidence that this is what he did.

It was submitted by counsel for the petitioner that the respondent was living in Florida in the first place merely because his service demanded it and, therefore, that he could not be said to have acquired a residence or to be residing there, as he was not residing there at any time from choice. I am quite satisfied that, although he went to Florida in the first place because it was his duty to go and, indeed, remained there the whole time for the same reason, nevertheless he had during the time that he was in Florida conceived the desire to remain there, and that, although he was in Florida in the course of his duties, he was also there from choice, and had every intention of remaining there from choice—that is to say, I am satisfied that he was in fact residing and had in fact acquired an intention of continuing to reside in Florida.

It has been submitted that all that happened in this case was that the respondent formed the intention to acquire a domicile in Florida at some future date and that that intention was, in fact, never carried out because the parties returned to this country and remained here. The respondent has been quite fair about that. He told me the factors which caused him to come to his decision in 1944, namely his opinion that if he became involved in divorce proceedings his useful Service career would be at an end, and the statement of the woman whom he wished to marry, that she would not live outside the United States of America. He told me that when he later returned to England he realized that the Air Ministry had adopted an entirely different view of the conduct of officers involved in divorce proceedings, and that the fact of being so involved would not greatly affect them. He also found that as time went on his wife was quite happy to live in this country and that that objection, also, had gone. Although he may not have the intention now of taking up an immediate domicile in Florida or in any other place but England, in 1944 when this decree was made he had every intention of remaining in Florida and had acquired a domicile of choice there.

That being so, I find that this order which was made by a Court in Florida was a valid decree, and that the marriage was dissolved at that time. It is clear therefore there can be no decree in these proceedings as the marriage was dissolved in 1944.

Solicitors: *Donald, Darlington & Nice*; *Lee, Bolton & Lee for Gillespie & Mclean, Nottingham.*

J. B. G.

IN THE ESTATE OF GOENAGA DECD.

1948
Nov. 17.
Ormerod J.

Probate—Private International Law—Executors—Testator domiciled abroad—English will executed in England—Property in Great Britain and the British Empire.

The powers of an English executor appointed by an English will executed in England and restricted to property in Great Britain and the British Empire are governed by the lex fori.

A Frenchman domiciled in France at the time of his death executed in England a will in English form dealing with his property in Great Britain and the British Empire. The will was properly prepared and duly executed in accordance with English law and was in the circumstances valid under French law. Three years after the death of the deceased, the executors applied by way of motion for a grant of probate.

Held, that although by the lex domicilii the powers of an "exécuteur testamentaire" are restricted to a period of one year after the death of the deceased the court should apply the lex fori, and, disregarding the time limitation imposed by the lex domicilii, make the grant as prayed.

PROBATE MOTION: application for grant of probate.

The following statement of facts is taken from the case on motion:—

The will was made in the proper form and duly executed in accordance with English law; and there was no dispute that the will was valid under French law in the circumstances. A daughter to whom powers of attorney had been given by those interested under the will, consented to the application as made by the Midland Bank Executor and Trustee Company Ltd.; and the company were ready and willing to take out the grant of probate as prayed by the motion.

By art. 1025 of the French Civil Code: "Le testateur "pourra nommer un ou plusieurs exécuteurs testamentaires."

By art. 1026: "Il pourra leur donner la saisine du tout, "ou seulement d'une partie de son mobilier; mais elle ne "pourra durer au delà de l'an et jour, à compter de son "décès. S'il ne la leur a pas donnée, ils ne pourront "l'exiger."

As the deceased had died some three years before the present application, the question arose whether the court had power to grant the application to the executors under the lex fori; or whether the powers of the executors were limited by the lex domicilii to those of an "exécuteur testamentaire," with the consequent limitation to a period of one year only.

1948

GOENAGA DECD., IN THE ESTATE OF.

Expert evidence was given by P. A. Picarda, of the English Bar and Avocat à la Cour d'Appel de Paris; and an opinion which he had given was annexed to an affidavit before the court. By the said evidence and opinion the court was informed that the will, which was in English form and had been made in England, was valid under French law by virtue of art. 999 of the French Civil Code (1).

The witness referred to art. 1025 and art. 1026 of the Code, and said that an "exécuteur testamentaire" was appointed by a testator to see that the provisions of his will were carried out; there was no question of the estate being vested in the "exécuteur" unless the testator gave him the seizin under art. 1026. In that case the seizin was limited by law to a period of one year. It was submitted that should a Frenchman make a will in England in English form and appoint executors therein, the powers of those executors would be those of an English executor and not the restricted powers of an "exécuteur "testamentaire."

He referred in his opinion to *Ewing* v. *Orr-Ewing* (2), *In re Lorillard* (3), and to *In re Kloebe* (4).

C. A. Marshall-Reynolds for the executors submitted that whereas the question of the formal and material validity of a will was clearly governed by the lex domicilii of the testator the powers of an English executor appointed by an English will restricted to property in Great Britain and the British Empire was governed by the lex fori; even though the domicile of the deceased was elsewhere. He referred to *In re Lorillard* (3): "The principle is that the administration of "the estate of a deceased person is governed entirely by the "lex loci and it is only when the administration is over that "the law of his domicile comes in."

ORMEROD J. I will make the order as prayed.

Solicitors: *Devonshire & Co.*

(1) Art. 999: "Un Francais qui "se trouvera en pays étranger, "pourra faire ses dispositions "testamentaires par acte sous "signature privée, ainsi qu'il est "prescrit en l'article 970, ou par "acte authentique, avec les formes "usitées dans le lieu ou cet acte "sera passé."

(2) (1885) 10 App. Cas. 453, 502.

(3) [1922] 2 Ch. 638, 645-6.

(4) (1884) 28 Ch. D. 175, 177.

J. B. G.

Not followed. *Re* St. Saviour's, Walthamstow. [1950] 2 All E.R. 70.

Considered. *In re* St. Saviour's, Walthamstow [1951] P. 147

In re THE CHURCH OF THE HOLY TRINITY, WOOLWICH

1949
Apr. 28.

Chancellor
E. Garth Moore

Ecclesiastical law—Faculty—Removal of existing ornaments from Holy Table—Substitution of six candlesticks—Amended inscription—Number of candlesticks—" Good order."

Modern scholastic research having shown that the old English use was to place lights on the Holy Table and that the number of lights varied, it is not illegal to place six candlesticks on the Holy Table. Of these the number to be used at any given moment may properly be subject to the directions of the Ordinary as being a question of good order, which is a question for the consideration of the Ordinary rather than for the Chancellor.

On April 28, 1949, at a sitting of the consistory court for the diocese of Southwark, Mr. E. Garth Moore, the Chancellor, heard the petition of the Reverend H. J. C. Wall, the rector, and Mr. T. E. Hunter and Mr. P. E. Davis, the churchwardens of the Church of the Holy Trinity, Woolwich, for the removal of a redundant brass eagle lectern inscribed " In affectionate " memory of Sally, the beloved wife of John Ottis Reynolds, " Esquire, of Sevenoaks, Kent, died 6th December, 1882, for " many years worshipping in this Church " ; for the removal from the Holy Table of a cross with a removable oak base, having thereon the following inscription : " In Memoriam " C. M. H., C. A. I., A. M. T., Requiescat in pace " ; and for the removal of two altar candlesticks which had no inscription. They further petitioned for leave to place on the Holy Table six candlesticks and a crucifix in place of the ornaments removed and to dedicate the candlesticks to be inscribed with all the commemorative words above mentioned and " In Memoriam A. B. M., Died September 1944. " Requiescat in pace."

The petition was not opposed.

W. S. Wigglesworth for the petitioners : On the question of law as to the permitted number of candlesticks : There were at least thirty-seven churches in the diocese which had six candles on their altars although he was not aware whether faculties had been granted in respect of them. In the Church of the Holy Trinity, Woolwich, the altar is placed in a dark recess and, therefore, this is a case where candles would not be placed on the altar for ceremonial to the exclusion of utilitarian

1949

THE CHURCH OF THE HOLY TRINITY, WOOLWICH, *In re.*

ends. Other artificial light in the church is electric. In *In re St. Saviour's Hampstead* (1) it was held that the use of six lights on the Holy Table was unlawful. In that case, however, Chancellor Errington satisfied himself that, by ancient usage, the number of lights was two, and he purported to follow *Read* v. *The Bishop of Lincoln* (2). The last-mentioned case decided only that a clergyman did not commit an offence by placing two lights on the Holy Table. This court is entitled to take into account the fruits of historical research and, therefore, decisions of ecclesiastical courts made some time ago are not necessarily binding today.

[THE CHANCELLOR: In the *Bishop of Lincoln's* case (2) the court never said that more than two lights were illegal.]

The report of that case refers to the injunctions of Edward VI which were penal and mercenary having as their object the enrichment of the Exchequer by the forfeiture of lights and bells. On questions of pre-Reformation use see " The Shape of the Liturgy, by Dom Gregory Dix, D.D., Oxford, 2nd ed. at page 419.

[THE CHANCELLOR: You have also the support of the Dean of York.]

I believe that I also have the support of His Majesty the King, who, before the war, gave six candlesticks to the Guards' Chapel. The court is bound only by questions of æsthetics as to the shape or form of the candlesticks; it is not bound by the *Bishop of Lincoln's* case (2) nor by *Capel St. Mary* (3) which was really an unargued decision in which Sir Henry Slesser wrongly accepted that he could not argue the legality of six lights, nor by *In re St. Saviour's Hampstead* (1) which was decided on the false premise that the pre-Reformation use was two.

[THE CHANCELLOR: If I decide that it is open to me in law to grant this faculty, would it be proper for me to refer the matter to the Bishop as a point of good order ?]

It has been done in some classes of cases, for instance, with organs and bells.

THE CHANCELLOR, after stating the facts said: There are only two points in this application which exercise me and they are whether the words "Requiescat in Pace" form an appropriate inscription and whether it is open to me in law to grant a faculty for six lights to be placed upon the altar. With regard to the inscription, I am not exercised about the propriety of prayers for the dead, but I was doubtful whether in 1882 the words in question would have been put on a memorial, but I am now satisfied that they might well have been and that in this case the inscription may with propriety be allowed.

---

(1) [1932] P. 134.
(2) [1892] A. C. 644.
(3) [1927] P. 289.

The second point is not wholly free from doubt and, indeed, many persons might think that I am bound by authority. Perhaps the least impressive but the most emphatic of these is Dr. Dearmer's book, the Parson's Handbook, which however, is not always consistent in its various editions even with itself. In the latest edition, the 12th, he states at page 87: "The use of a row of six candlesticks on the altar, or on a shelf "or gradine behind it, is pure Romanism, and a defiance of "the Ornaments Rubric, as of all other authority in the Church "of England." In *In re St. Saviour's Church, Hampstead* (1) Chancellor Errington gave judgment against six lights on the Holy Table, and in the *Rector and Churchwardens of Capel St. Mary, Suffolk* v. *Packard* (2) the Dean of the Arches ordered the removal of four of six candlesticks, and counsel in that case felt himself unable to support any argument for the retention of all six. The argument therefore, against the use of six candlesticks is not to be ignored. My own view, irrespective of any authorities, is that no rule of law or usage can be laid down with regard to the number of lights on the altar. More recent research indicates that, at any rate on the Continent, any number of lights might be placed on the altar. Scholastic authorities on the English use are not so certain, but it does seem certain that before the Reformation two lights on the altar was the more common practice, though both Dom Gregory Dix and Mr. Comper are able to cite some instances to the contrary. Indeed, if the matter were to rest entirely on the scholastic material available, the most that could be said is that the placing of two lights was usual, but that instances of a varying number can be found. The present most common usage is certainly two, but one sometimes finds six and even four as, for instance, in the Chapel of King's College, Cambridge, for which, I believe, the present Dean of York was largely responsible.

On the question of law involved it may be asked whether, in view of the decisions of Chancellor Errington and the Dean of the Arches, I am free to grant a faculty for six lights, and if

(1) [1932] P. 134. (2) [1927] P. 289.

free to do so, whether I ought to grant it in view of the weight these decisions carry. The case of *In re St. Saviour's Hampstead* (1) is not binding on me in law as it was decided in another diocese. With all respect to the learned Chancellor who decided that case, I am unable to follow the argument which led him to his conclusion. I accept counsel's argument, in that case that the effect of the decision in *Read* v. *Bishop of Lincoln* (2) is only that the pre-Reformation use was that lights were placed upon the altar. That case was concerned with the question of the use of lights rather than the number, even though the pre-Reformation use did happen to be two only. Decided cases have only declared that the use of two lights was not illegal. Nor am I impressed with the statement that six candles is the Roman use. It is only the Roman usage in so far as since the Reformation directions have been issued by that church to the effect that six lighted candles should be placed upon the altar during High Mass. In any case the fact that the use of six lighted candles is approved by Rome is no argument against their use by the Church of England. Moreover the history of the Church does show that in these matters different rules have been laid down from time to time and in some cases there have been no rules at all.

For these reasons and because I am not bound by the case of *In re St. Saviour's Hampstead* (1) and fortified as I am by modern scholastic research since its decision, I have decided, though not without some hesitation in disagreeing with an ecclesiastical lawyer of his eminence, to disregard Chancellor Errington's judgment. In the case of *Rector and Churchwardens of Capel St. Mary, Suffolk* v. *Packard* (3), which came before the Court of Arches, Sir Henry Slesser felt that he could not even put forward an argument in favour of retaining six candles. I agree with Mr. Wigglesworth in the present case that the point was never really argued. If arguments had been advanced in favour of six lights and, in spite of those arguments, the same decision had been reached I should feel bound by the case. But, as it stands, I consider that the case went by default. The court did not lay down that six candlesticks were illegal, or, if it did do so, the decision was obiter, because it was agreed that only two candles should remain. In both the above cases reference is made to *Read* v. *Bishop of Lincoln* (2) but to my

(1) [1932] P. 134.
(2) [1891] P. 9.
(3) [1927] P. 289.

mind, in that case, the court decided no more than that two lights were lawful and, consequently, no assistance in this matter is to be derived from a study of that case.

For these reasons I have come to the conclusion that I am at liberty to exercise my discretion and that there is, in law, nothing to prevent me from granting this faculty. I must still exercise my discretion as to whether such a grant would be proper in this case having regard to two factors. The first is a question of æsthetics which, in my opinion, have been the governing factor in all the changes in the number of lights in the past. I have to consider whether the altar is too short for six candlesticks and a crucifix. From the photographs before me, I think that possibly it may be rather short but, in the circumstances, I do not think that it would be right for me to impose my view on those most nearly concerned, who use the church daily and weekly.

The second factor is the important one of good order to which reference is made in *St. Saviour's Hampstead* (1). Mr. Wigglesworth has acquiesced that in this case it would be proper to leave the decision as to the number of candles to be used at any given moment to the directions of the Ordinary and that is what I propose to do. I propose, therefore, to grant the faculty for the six candlesticks subject to the direction, until further order, that not more than two of the lights should be upon the altar at the same time. The petitioners should in due time approach the Bishop and discuss the number with him. I am prepared to leave the decision as to the number of lights at any given moment to the directions of the Ordinary. Whether or not there should be more than two lights is a matter of good order, and is the primary concern of the Diocesan and not of the Chancellor. If the Bishop permits six or four, then I shall be prepared to grant a further order which will give lawful effect to his direction.

Petition granted.

Solicitors for the petitioners: *Trollope & Winckworth.*

H. G.

---

(1) [1932] P. 134, 141.

C. A.

1949
Mar. 30, 31.

Lord Merriman P.,
Bucknill and
Cohen L.JJ.

EVERITT *v.* EVERITT.

Divorce—Husband and wife—Desertion—Husband reasonably believed by wife to be guilty of adultery—Offer by husband to resume cohabitation when grounds for wife's belief had disappeared—Wife's refusal—Effect on state of desertion—Actual resumption of cohabitation proved in appellate court.

If a husband deserts his wife and lives with another woman in circumstances which give the wife reasonable grounds for believing that the husband is living in adultery with that woman, the refusal of the wife to resume cohabitation when the suspected adulterous association has to her knowledge come to an end does not have the effect of terminating the husband's desertion. *Basing* v. *Basing* (1864) 3 Sw. & Tr. 516, applied; *Lodge* v. *Lodge* (1890) 15 P. D. 159 overruled. The finding of the court at the hearing of the wife's petition for divorce on the ground of desertion that the suspected adultery was not proved or had not taken place, in no way alters the position. *Glenister* v. *Glenister* [1945] P. 30 applied.

Quaere, whether if the husband returns to the matrimonial home and remains there, even against the will of the wife, it can be said that the parties are still separated. *Hopes* v. *Hopes* ante p. 327 considered.

Appeal from a decision of Commissioner Blanco White K.C.

The appellant presented a petition for divorce on the grounds of desertion by the respondent, her husband. The commissioner dismissed the petition and the wife now appealed.

The facts are fully stated in the judgment of the President, and briefly summarized were as follows: The parties were married in April, 1943, and during the first months of his marriage the husband pursued his association with a woman with whom he had had sexual relations before his marriage—a fact well known to his wife. Within six months he went to live in the same house as the woman. He thus furnished the wife with reasonable ground for believing that he had resumed and intended to continue his former association, which would now be adulterous. In February, 1944, the wife obtained a maintenance order from a metropolitan magistrate on the ground of desertion. The order was never enforced and the husband made no payments under it. In the year 1945 the husband intimated to his wife his wish to resume cohabitation with her. He told her that the woman in question had married a Belgian and had left the country, and that he had not committed adultery with her because her association with the Belgian had already begun when he (the husband) went to live in the same house. The wife refused to have the husband back, but he installed himself in her flat and lived there for four months before she left. At the hearing of her petition for divorce on the ground of desertion, the husband swore that during the last-mentioned four months they had lived as man and wife, whereas the wife's evidence was that they lived an entirely separate existence in the flat. The commissioner did not decide that question, because he held that the wife was not justified in refusing to resume cohabitation after the husband had terminated the state of desertion by returning in changed circumstances, i.e., his association with the woman was clearly at an end, and he dismissed the petition. The wife appealed.

The Court of Appeal heard evidence of the wife's having written a letter to her husband from which it was clear that the parties resumed cohabitation during the four months period that the husband was installed in the wife's flat.

Trevor Reeve for the wife. When not accepted, an offer to return, to have the effect of terminating an already existing state of desertion, must not only be genuine in the sense that the deserting spouse bona fide desires a resumption of cohabitation, but must also be one which in all the circumstances the deserted spouse is bound to accept or be turned himself or herself into the deserting spouse. A spouse who has reasonable grounds for believing that the other spouse has committed adultery cannot be held guilty of desertion. The offer in this case did not therefore have the effect of terminating the desertion. *Lodge* v. *Lodge* (1) is incorrectly decided. The obiter dictum at the conclusion of the judgment in *Basing* v. *Basing* (2) is a correct statement of the law.

[*Thomas* v. *Thomas* (3); *Thomas* v. *Thomas* (4); and *Glenister* v. *Glenister* (5) referred to.]

Constance Colwill for the respondent husband was not called on.

LORD MERRIMAN P. This case raises two quite distinct questions. The first and important one is whether in the circumstances of the case the wife, who had undoubtedly been deserted before the statutory triennium, was entitled to refuse to resume cohabitation without either, at the least, bringing the husband's desertion to an end or even, at the worst, becoming herself the deserter. Secondly, whether, assuming that the wife was entitled to refuse to resume cohabitation in the fullest sense of the word, there was such a degree of cohabitation during the triennium as to prevent the previous state of desertion from continuing to subsist during the whole of the statutory period.

---

(1) (1890) 15 P. D. 159.
(2) (1864) 3 Sw. & Tr. 516.
(3) [1924] P. 194
(4) (1946) 62 T. L. R. 166.
(5) [1945] P. 30.

The commissioner decided the case against the wife on the ground that, by refusing to resume cohabitation she did at any rate terminate the husband's desertion. He did not actually decide the second question, but he apparently accepted the wife's evidence, at any rate in one material particular to which I shall allude more particularly later, as against the husband's, but did not actually decide the point.

The facts were as follows: The parties were married on April 28, 1943. The marriage was, in one sense, a marriage of necessity. We do not know whether the parties would in any case have got married but it is plain that they were married when they were because the child, of which the husband was admittedly the father, had already been conceived. They lived together until September 6 of the same year. During those months, according to the evidence of the wife, and I am assuming in her favour that she was believed, the husband had been spending unconscionable periods of his time with a woman with whom admittedly he had had sexual relations before he had married his wife. It was said that he was constantly lunching there, and that, barely staying at home long enough to change his clothes in the evening, he went to spend his evenings with this woman. Finally on September 6, even before the expected child was born, he left his wife and by October 20 had actually gone to live in the house of this woman. It is important to note the fact that he had already had sexual intercourse before marriage was well known to the wife.

This act of his in deserting his wife within a few weeks and going to live in that particular house clearly falls within the description of conduct calculated to make the wife believe that he had resumed and intended to continue an association with his old love which, by reason of his intervening marriage, had now become an adulterous association. Plainly there was abundant evidence on which the commissioner could hold that on September 6, the husband deserted the wife. On February 1, 1944, the wife obtained an order from a metropolitan magistrate on the ground of desertion. That order was never enforced, and the husband made no payments under it. In these circumstances it seems to me quite impossible to contend that the inception of a period of desertion in September, 1943, was not fully proved; indeed, I do not find that it was seriously contested.

After nearly two years, namely at the end of July or early in August, 1945, the husband intimated his wish to resume cohabitation. He accompanied this intimation with a statement that the woman at whose house he had been living had in fact married a Belgian some little time before and had gone with her husband to Belgium. He added that he never had in fact committed adultery with this woman, though he had lived under her roof, because from the time when he went there she was taken up with this Belgian whom she married. The wife says that she refused to have him back. Nevertheless, by some means which have not been made plain to us, the husband contrived to install himself in his wife's flat which consisted of three rooms, a bedroom, a sitting-room, and a small kitchenette, with a stove in the passage outside.

The wife said, and here there was an acute conflict of evidence between the two spouses, that during the period that she remained in this flat, which I think is now quite plainly shown to have been almost exactly four months, she not merely did not consent to his coming in and installing himself but she never consented to his remaining there; that they slept in separate rooms, she and the child retiring to a couch in the sitting-room and the husband occupying her bedroom; that there was no sexual intercourse between them; and that she performed no wifely duties of any sort for him.

The husband, on the other hand, swore that they were living together as husband and wife in the full sense of the word, including sexual relations, and that she was performing all the ordinary wifely duties such as looking after his rations, preparing his meals, and so forth.

On November 29, the wife left. I shall, in connexion with this part of the case, consider later the circumstances in which she left.

In view of the possibility that other proceedings may supervene later I do not propose to express any opinion at all or to find any fact, for we have no material for finding facts, about what happened after November 29, beyond saying this which is common ground: the wife went to another flat which she had meanwhile obtained, and after about a fortnight the husband joined her there. I hope I have used a sufficiently colourless expression. Again after yet another fortnight she departed, leaving him in that particular flat. There, so far as this matrimonial history is concerned, I propose to stop and to examine the issues raised by the commissioner's judgment.

The commissioner gave careful and patient consideration to what was a very difficult case as it was presented to him, though it has somewhat clarified itself so far as the facts are concerned by something which has happened before us.

The commissioner summarized the matter thus: "The "question is whether in these circumstances, the husband, "by offering to return to his wife and to resume matrimonial "life with her—and indeed, doing all he could physically to "resume life with her—has terminated his desertion. Mr. "Reeve argued that there was no obligation upon her to "accept an offer to return, because that would mean an "obligation to condone adultery and that therefore his offer, "however sincere and however often repeated, did not "terminate the desertion. He relies on several cases, in "particular on *Basing* v. *Basing* (1). I think I must have "regard to the fact that at the time the husband came back "in the middle of 1945 his association with Mrs. Reeves was, "to the knowledge of the wife, completely over. Mrs. Reeves "had married another man and she was going to leave the "country—indeed, shortly after that, to the knowledge of the "wife, Mrs. Reeves did leave the country with her new husband. "The circumstances were totally changed from the circum-"stances at the time the husband deserted the wife. Though "the wife may have believed that there had been adultery, "she knew that the circumstances were changed, and not "only was there no misconduct taking place but the circum-"stances had changed in which that misconduct did take "place. That the husband desired to return to his wife, "I personally have no doubt and, though the wife had the "right if she could prove adultery to get a divorce on the "ground of adultery, I do think and I hold, that the husband, "by coming back to his wife in the changed circumstances, "terminated the state of desertion in which he was and, "therefore, I dismiss the petition."

(1) (1864) 3 Sw. & Tr. 516.

C. A.

1949

EVERITT
v.
EVERITT.

Lord Merriman
P.

I will only add, before I comment on this crucial passage in the judgment, that the commissioner had made more than one plain suggestion—seeing the difficulties that were likely to arise, perhaps on reading the pleadings, but certainly on hearing the case opened—to induce the wife to amend her petition by charging adultery but it was not felt possible to accede to that suggestion.

That brings me to a consideration of this last paragraph, in which the commissioner gives his reasons for dismissing the petition. I am still in doubt what he was actually holding. There are three possibilities. If he meant that the husband's explanation to the wife when he returned in 1945, including as it did an express denial of having committed adultery at all, ought to have dispelled the wife's belief that he had committed adultery, a belief which the commissioner found hitherto amply justified by the husband's conduct, that decision would be correct in law. But the difficulty which I feel about that is that it seems to be in conflict with an earlier finding in the following passage of the judgment. After referring to the husband's statement that during his sojourn in Mrs. Reeves' household, he had been merely a lodger, the commissioner said: " Adultery with Mrs. Reeves is not " alleged in this case. If it were alleged, having regard to the " presence of the Belgian whom she subsequently married, " I should find on the evidence before me that I was not " satisfied as to the adultery. Having regard, however, to " the previous intimate associations between the husband and " Mrs. Reeves, I think that the wife was amply justified in " concluding that adultery between them had taken place."

I must say that on the facts I should have some difficulty in coming to this first suggested conclusion of the commissioner. I am doubtful whether on the facts I should be prepared to support that finding if that is the correct interpretation of it.

The second possible meaning is that the wife's petition must be dismissed because of the commissioner's finding, in giving judgment on her petition, that he was not, at the moment of giving judgment, satisfied that the husband had committed adultery, though up to that moment the wife was amply justified in concluding that adultery between them had taken place. If that is what he meant, that conclusion would in my opinion be in plain conflict with the decision of the Divisional Court of the Divorce Division in *Glenister* v.

C. A.

1949

EVERITT
v.
EVERITT.

Lord Merriman P.

Glenister (1), and in particular with the reasoning on which that decision is based.

I am in the embarrassing position of being obliged to refer to a number of my own judgments because most of the cases which have been cited are decisions of the Divisional Court over which I habitually preside. *Glenister* v. *Glenister* (1) which has not yet been criticized by higher authority establishes this proposition. As I then said, I took " a hypothetical " case, in which, short of actual and direct proof of adultery, " the wife so conducts herself to the knowledge of the husband " as to warrant the inference that adultery has been com- " mitted, though (I am supposing) that is ultimately held not " to be the fact." I posed the dilemma that if the husband continues to cohabit with his wife he risks being held to have condoned the adultery if it is ultimately established, while if he leaves his wife because of this belief induced by her own conduct, he is liable to be held to be a deserter. I then went on : " It seems to me to put the husband in an almost " impossible position if that is the law. I do not think it is. " I think that if the wife has so conducted herself as to lead " any reasonable person to believe, until she gives some " explanation, that she has committed adultery, the husband, " becoming aware of the facts and honestly drawing that " inference, and leaving his wife on that ground, ought not " to be held to have left her without reasonable cause."

I founded that judgment in part on a decision of Sir James Hannen in *Ousey* v. *Ousey* (2). As long ago as the year 1900, Sir Francis Jeune P., in the well-known case of *Synge* v. *Synge* (3) thus referred to *Ousey* v. *Ousey* (2) : " The primary " question to be decided is, had the husband reasonable " ground for desertion ? If belief is to be taken into con- " sideration, why should not his honest belief that his wife " refused him marital rights without cause justify his conduct, " even though the wife honestly believed that she had good " grounds for such refusal ? " Then he adds these words which are of general application : " The solution of the problem " presented by such conflict of belief is, I think, to be found in " holding that where the fact can be determined, the fact " must prevail, and that erroneous beliefs on either side are " immaterial."

On that hypothesis the facts were, at the earliest, ascertained

(1) [1945] P. 30.

(2) (1874) L. R. 3 P. & M. 223.

(3) [1900] P. 180, 197.

at the moment when the learned judge gave judgment. In *Wood* v. *Wood* (1) I gave the example of a confession by the wife of adultery, with every circumstantial detail fully justifying the husband's belief in the fact that she had committed adultery and, so long as that belief subsisted, entitling him to withdraw from, or to refuse to resume, cohabitation. There might, however, come a moment when, in spite of her confession, or indeed because of her oath that her confession had been false, the new statement being supported with equally circumstantial detail, a judge might hold that not only was the charge of adultery not proved but that the wife had not in fact committed adultery. From that moment the fact has been ascertained and there is no longer any room for the belief; but that does not act retrospectively or retroactively. So long as the belief is reasonably and properly held, the husband's conduct, and the parties' respective rights in relation to cross charges of desertion are adjudicated on according to the existence of the belief. There may come a moment beyond which that is no longer possible. If therefore, the commissioner here was holding that his finding that adultery had not been proved to his satisfaction, though the wife had been until then amply justified in believing that it existed, had brought the period of desertion alleged in the petition retroactively to an end, he was, in my opinion, wrong.

There remains the third possibility: if the passage in question in the commissioner's judgment means that there had indeed been an actual adulterous association but that its cessation because of the marriage and the departure for Belgium with the husband of the woman in question rendered the wife's refusal to resume cohabitation unjustifiable, that decision was in my opinion also wrong.

I think that there is a good deal to be said for the argument that that is what he really meant. This short passage in his judgment seems to me to suggest this interpretation. The commissioner said: "I think I must have regard to the fact "that at the time the husband came back in the middle of "1945 his association with Mrs. Reeves was, to the knowledge "of the wife, completely over. Mrs. Reeves had married "another man and she was going to leave the country— "indeed, shortly after that, to the knowledge of the wife, "Mrs. Reeves did leave the country with her new husband."

---

(1) [1947] P. 103, 107.

He adds, "not only was there no misconduct taking place "but the circumstances had changed in which that misconduct "did take place."

I know of no authority in support of the proposition involved in this third suggested interpretation of the judgment except *Lodge* v. *Lodge* (1). Mr. Reeve says that he did not actually cite *Lodge* v. *Lodge* (1) to the commissioner, but that he was, so to speak, steering his argument away from *Lodge* v. *Lodge* (1) towards *Basing* v. *Basing* (2). Unfortunately *Lodge* v. *Lodge*(1) is still cited in the textbooks on this subject, and it may be that the commissioner saw the note in Rayden on Divorce which refers to it. The proposition contained in the third suggested interpretation of the commissioner's judgment is almost the decision in *Lodge* v. *Lodge* (1).

It is unfortunate that this case still appears in the textbooks, because a Divisional Court composed of Hodson J. and myself in *Volp* v. *Volp* (1940) unreported, expressed in no measured terms that it was no longer to be regarded as the law. I there began by saying this: "The argument for the husband has "been founded on *Lodge* v. *Lodge* (1). That is a case which "has not found favour with textwriters. There has, for "many years, been very adverse criticism of the decision in "Rayden on Divorce but, as we are constantly having this "case cited to us in support of an argument like the present "in these appeals from justices, I think that the time has "come to say something dogmatic about the case." I then went on to analyse the decision of Butt J. After referring to the facts that the original parting had been by arrangement and that the wife had then pressed the husband to rejoin her, and had been met by a refusal, I continued: "It is quite "plain from the judgment of Butt J. that he considered that "that amounted to desertion on the part of the husband. "In fact, he says in his judgment, 'Desertion undoubtedly "'commenced in August, 1886, when the husband on one "'excuse or another refused to accompany his wife to "'Bournemouth; but the question is whether that desertion "'has been continued for two years and upwards.'" In *Lodge* v. *Lodge* (1) the wife was petitioning, in accordance with the law as it then stood, for divorce on the ground of adultery coupled with desertion for two years and upwards, whether or not immediately preceding the presentation of the petition. I then went on: "It appears that in the course of

---

(1) 15 P. D. 159.

(2) 3 Sw. & Tr. 516.

" the two years, namely, in February, 1887, the wife acquired " for the first time knowledge of the fact, which was not disputed at the trial, that her husband had been living in, " adultery with another woman for at least six years. It " appears, if it had ever ceased, at any rate to have continued " down to what the judge describes as ' the autumn of last " ' year ' ; that is the autumn of 1889." From that, of course, it followed that the adultery had been going on through more than the period of two years which was in fact relied on. Then my judgment continues : " After setting out those facts, Butt J. " is reported as having said, ' That being so, she was within " ' her right to decline to resume cohabitation with the " ' husband,' a proposition about which I should venture to " suggest there could be no possible doubt at all. He goes on, " ' But there remains the question, can she insist on a separa" ' tion from her husband and at the same time use the separa" ' tion which she insists on as a desertion by her husband ? ' " Well, of course not. If she has insisted on a separation " to the extent of obtaining a decree obviously she cannot " thereafter insist that any separation after that is desertion " on the part of the husband. But that is not apparently " what Butt J. means, because there had been no decree " in that case ; he was referring to the fact that she was trying " to get a divorce for desertion based upon her remaining " absent because of her husband's adultery. He says, ' I think " ' not. More than one offer was made by the husband to " ' return to cohabitation ; but the wife's reply to those " ' offers was to direct her solicitors to inform her husband " ' that she had made up her mind not to live with him. " ' In the witness box she stated that to have been, and to " ' be, her determination.' It must be borne in mind that " Butt J. had already found that she was within her rights " in declining to resume cohabitation. If so, she was under " no obligation to accept these offers of her husband. The " general question was not whether the offers were genuine " or not genuine, but whether she had the absolute right to " refuse them. Butt J. went on, however, ' If it appeared " ' that the husband's offer to return to cohabitation was not " ' bona fide, it would not bar the wife's remedy. But the " ' onus of showing that lies with the wife, and I am of the " ' opinion that it has not been shown in this case.' Accord" ingly, he pronounced a decree of judicial separation on the " ground of adultery. If, as appears to be indisputable, the "wife had ample grounds for refusing any offer made by her "husband, the question of the genuineness of the offer did "not arise at all. If, by refusing an offer made in those "circumstances, she is precluded from saying that a state of "desertion continues, it seems to me that that is tantamount "to saying that she makes herself a deserter by such refusal "but that quite unquestionably is not the law."

I then proceeded to analyse the proposition that any such conception of the law is in direct conflict with the well-known judgment of Warrington L.J. in *Thomas* v. *Thomas* (1). To read that passage or to comment on it at length would merely be to repeat what was said by the Divisional Court in another *Thomas* v. *Thomas* (2). I have read and re-read that passage for the purpose of this judgment and I am prepared to stand by it. The point was that, for what I hoped was the last time, the well-known passage from Lord Penzance's judgment in *Fitzgerald* v. *Fitzgerald* (3) had been cited and pressed upon the Divisional Court. Lord Penzance said, "If the state of "cohabitation has already ceased to exist, whether by the "adverse act of husband or wife, or even by the mutual "consent of both, 'desertion,' in my judgment, becomes "from that moment impossible to either, at least until their "common life and home have been resumed." Already in *Jordan* v. *Jordan* (4), I had set out a number of cases in which that dictum had been criticized until almost no effect remained to it. I had also pointed out that even in *Fitzgerald* v. *Fitzgerald* itself (3) the subsequent history shows that Sir James Hannen decided exactly the opposite when two or three years later the same parties came before him. For he then pronounced a decree on the ground, among others, of desertion although it was plain beyond doubt that there had been no resumption of cohabitation, no restitution suit, and nothing more on the part of the wife than a formal demand that her husband should resume married life. Moreover, in *Pardy* v. *Pardy* (5), the Court of Appeal decided that, in the case of a consensual separation when once the separation deed has been eliminated by a repudiation by one spouse accepted by the other, it is quite competent for the aggrieved spouse to establish a state of desertion without any previous resumption of cohabitation. In *Thomas* v. *Thomas* (2), however,

(1) [1924] P. 194–201.
(2) (1946) 62 T. L. R. 166.
(3) (1869) L. R. 1 P. & M. 694.
(4) [1939] P. 239.
(5) [1939] P. 288.

we were being pressed to say that that was all very well as regards a consensual separation; that one could, so to speak, start from the neutral (no desertion) and establish the positive (desertion), but could not start from the negative (desertion by the one spouse) and go straight to the positive (the desertion of the other) without an intervening state of rest by a resumption of cohabitation. In order to show the fallacy of that, I pointed out that it was in flat contradiction of what Warrington L.J. said in the other *Thomas* v. *Thomas* (1). Without reading the passage, I can thus paraphrase the proposition: the only possible conclusion from Warrington L.J.'s judgment in *Thomas* v. *Thomas* (1) is that the unjustified refusal by the spouse who has been deserted to resume cohabitation not merely terminates the desertion but also reverses the process: it turns the tables—puts the boot on the other leg; and it is immaterial whether the case is one of mere desertion which is terminable by a simple offer on the part of the deserter to return or one of constructive desertion terminable, with more difficulty no doubt, by appropriate repentance and appropriate assurance of amendment of such a kind, according to the individual circumstances, as the aggrieved spouse is not justified in refusing. To that, of course, must be added the qualification that at the end of his judgment Warrington L.J. said, "in each case the question "must be determined on its own merits."

In another decision in the Divisional Court, *Edwards* v. *Edwards* (2) I concluded my judgment by saying: "There "may be some conduct so gross that no woman could be "expected ever to resume cohabitation with him. The point "is that every case must be dealt with on its merits, and if "his merits are so slight that the husband has very little hope "of ever being taken back, that is one of the consequences of "his own conduct, and it ought not to affect the result of the "case."

It follows, therefore, in my opinion, that if, for example, the husband is offering to resume cohabitation but has been guilty of adultery which is uncondoned as in *Lodge* v. *Lodge* (3) or of cruelty of so atrocious a character that the wife could not possibly be expected to subject herself to a risk of a recurrence, then in the words of Warrington L.J. in *Thomas* v. *Thomas* (1) "the actual separation must continue to have the quality

---

(1) [1924] P. 194–201.
(2) [1948] P. 268.
(3) 15 P. D. 159.

"of desertion by the husband; otherwise I see no alternative "except to regard the wife as deserting him, which would be "impossible." But that is precisely what was done in *Lodge* v. *Lodge* (1).

Lodge v. *Lodge* (1) also conflicts with *Basing* v. *Basing* (2) to which the commissioner was referred, although it is true it only conflicts with a part of the judgment which, strictly speaking, was obiter. I will read the passage because in my opinion every word of it is right. It is, again, a judgment of Lord Penzance, who said, "The only question in the case "was, whether this letter, if it amounted to an offer to renew "cohabitation with his wife, could be any bar to her right to "divorce on the above ground. I am of opinion that it was "not. The petitioner was not bound to condone her husband's "adultery, and take him back. The necessary period of "desertion was complete before the letter was written. Supposing that it were in any case necessary under the statute to "show that the desertion continued up to the filing of "this petition, such necessity could not apply to a case in "which the husband had in the meantime created a bar to "his wife's return by the commission of adultery." In *Lodge* v. *Lodge* (1) the letter interrupted the two years. Nowadays, of course, a triennium is required which immediately precedes the presentation of the petition. That is exactly the case supposed in the last sentence of Lord Penzance's judgment which I have just read. But, whichever it is, the point is that it is impossible to uphold *Lodge* v. *Lodge* (1) without turning the wife who refuses to return to an adulterous husband into a deserter by the very fact of her refusal. I now repeat in the Court of Appeal the words with which I concluded my judgment in *Volp* v. *Volp* (unreported) nearly nine years ago: "In my opinion the time has come to say plainly that *Lodge* v. "*Lodge* (1) cannot be cited as a case of authority."

The result, so far, is that I am very doubtful whether I should find it possible to uphold the commissioner's judgment on the ground on which it was based. That brings me to the further and better particulars of the answer. I propose only to discuss the period of four months of the alleged cohabitation at 193 South Lambeth Road. I have already alluded to the subsequent fortnight and I will say no more about it. With regard to the four months, I am not so much concerned with the question of whether desertion was condoned. That

(1) 15 P. D. 159.

(2) 3 Sw. & Tr. 516.

may raise some difficulties, which in my opinion it is unnecessary to pursue, because of the wife's assertion that she had nowhere else to go. The fundamental point about this part of the case is that it was decided by this court in *Hopes* v. *Hopes* (1), that the necessary element of separation cannot subsist when a husband and wife are living under the same roof unless they have ceased to share one household and have set up two households there. In my opinion it is impossible to limit that decision merely to the inception of the alleged desertion. The same principle must apply to the interruption of a period of desertion. In that case the Court of Appeal rejected the allegation of desertion on facts which were not so strongly in favour of the petitioner as those which the wife here attempted to prove. Be it remembered that what in effect she was saying was that the husband forced his way into the house and that they only remained together, in the sense in which she said that they were together, because he insisted on staying there against her will and she had nowhere else to go. That was a much stronger case than that in *Hopes* v. *Hopes* (1). Agreeing with it, as I most heartily do, apart from being bound by it, I think that the simplest and shortest way to apply *Hopes* v. *Hopes* (1) to this case is to look at it the other way round and see what every member of the court regarded as, so to speak, the high-water mark of the class of case in which, though living under the same roof, the parties could be regarded as in a state of separation. Every member of the court approved a judgment, which again happened to be one of my own, in *Smith* v. *Smith* (2). That was a test case and the King's Proctor had been brought in to argue it. Its facts are sufficiently summarized in another judgment of the Divisional Court, *Angel* v. *Angel* (3), which also found approval in *Hopes* v. *Hopes* (1). There I said, " in a word *Smith* v. *Smith* (2) was a case in which there being " so to speak three tiers of the structure in which the spouses " lived, a basement, a ground floor and a first floor, the husband " had withdrawn from the wife's society and had made his " home with his mother, so long as she was alive, who lived " in the basement. He only went to the ground floor on which " the wife thereafter lived because he could only get to his " bedroom on the first floor by going that way. The mother " died and the husband thereafter continued to make his

---

(1) Ante p. 227.
(2) [1940] P. 49.
(3) 62 T. L. R. 755.

C. A.
1949
EVERITT
v.
EVERITT.
Lord Merriman
P.

"home in the basement, everything else continued as before." There was the additional circumstances that, on his way through, the husband left from time to time sums of money arbitrarily selected by himself for his wife on her table without ever speaking to her or giving her any option.

Taking the wife's evidence at its highest, and assuming that it has been accepted by the commissioner not only as regards the allegation that there was no sexual intercourse, but that she was living in this three-roomed flat with the husband for four months virtually under duress; still I doubt whether it would be possible even if the husband had forced his way in in the first instance, to hold that for the whole period of four months a state of separation still subsisted. I doubt very much whether it would be possible to hold, applying the test laid down in *Hopes* v. *Hopes* (1), that there was not only the creation but also the subsistence of two households in those three rooms. It is not, however, necessary to express a concluded opinion on that question for this reason: when the wife left on November 29, it was said, a note was found. At the trial she persistently denied having written it. That denial was expressly abandoned in this court, and her counsel admitted that that note made it impossible to continue the argument that during these crucial four months there had been no cohabitation, and that whether it was or was not accompanied by sexual intercourse was immaterial.

The note read: "Dear Ted, forgive me for going like this "but I can't stand it any longer. Please look after Freddie. "I told them that he will be at the nursery tomorrow. I will "get your rations in tomorrow dinner time as I shall go to "work in the morning." It so happened that these people were actually working at the same firm. "Nobody need "know, also please don't go running to my people as it will "make it worse all round in time I shall properly "—I suppose she means probably—" come to my senses until then please "look after Freddie. Will see you in work tomorrow. Flo. P.S. "Have left some matches on shelf, hope you have a box. "Olive (that is the neighbour in the flat above) has got Freddie "she thinks I have gone to get some fish. I shall be going "away this weekend."

I wish to make it clear that I am deciding nothing whatever about the merits of this parting on November 29, still less anything about the subsequent parting a month later. What

---

(1) Ante p. 227.

C. A.
1949
Everitt
v.
Everitt.
Lord Merriman P.

I am deciding is that this note, now admitted to be in the wife's handwriting, is utterly inconsistent with her story that she and her husband were living together for four months as it were by force majeure so far as she was concerned.

The result, therefore, is that though I should feel great difficulty in upholding the dismissal of this petition on the ground on which the commissioner based his judgment, I think that it must inevitably be dismissed on the ground that it is impossible for this wife to establish on the facts, as they are now known, that a state of desertion subsisted during the whole of the statutory triennium.

In my opinion this appeal must be dismissed.

Bucknill L.J.: I agree. I do not feel altogether easy about the case because I think that the commissioner came to the correct decision for a wrong reason. In the first place one of the most important issues in the case was whether the wife had written this letter (which she now no longer denies writing). The commissioner did not decide the question who wrote the disputed letter, although he asked the wife to write out words in order to compare them with the disputed writing. He did not determine this issue of the letter because he thought it was immaterial as the husband had made an offer to come back and that that in itself terminated the desertion. The commissioner said, " The question is whether " in those circumstances the husband by offering to return " to his wife and to resume matrimonial life with her—and " indeed, doing all he could physically to resume life with her— " has terminated his desertion." The passage at the end of the judgment which as my Lord has read it, seems to be consistent with the commissioner's view that the husband's offer to return terminated the desertion. I think that the commissioner was wrong, and that he must have based his decision on the judgment of Butt J. in *Lodge* v. *Lodge* (1). I agree with the President's criticism of that decision, and I agree also with the judgment of the Divisional Court in *Volp* v. *Volp* (1940) unreported.

The passage in Rayden on Divorce (4th ed., para. 133) on this point reads: " Thus, a wife is always justified in " refusing to return to her husband, so long as he continues " an adulterous connexion; and may insist upon his fulfilment " of reasonable requirements as a condition of return to

---

(1) 15 P. D. 159.

"cohabitation." The note to that passage is: "The decision "in *Lodge* v. *Lodge* (1) would be in accordance with the modern "view, if there had been evidence in that case that the husband "had ceased his adulterous connexion."

Anybody reading the words of that paragraph and the note (I see that this statement of the law was in the 2nd edition of Rayden on Divorce (published in 1926)) and the decision in *Lodge* v. *Lodge* (1) would infer that if the husband announced that he had ended his adultery he was entitled to ask to be taken back, and that if the wife refused to take him back that he had then terminated his desertion.

I am a little puzzled to know why Butt J. came to that conclusion in *Lodge* v. *Lodge* (1). The decision seems to be inconsistent with the decision in *Basing* v. *Basing* (2), and also to be contrary to any natural idea of justice, for it means that a spouse may go away and live in adultery with another person for years and then when that other has died may ask the other spouse to take him or her back, and that the refusing spouse would then be in the wrong. That seems to me to be a quite unreasonable proposition. I think that the commissioner has gone wrong because he has been misled by *Lodge* v. *Lodge* (1) and had not the advantage of seeing the judgment in *Volp* v. *Volp* because that case had not been reported and the remarks in Rayden on Divorce do not suggest that *Lodge* v. *Lodge* (1) was wrongly decided.

It is unsatisfactory, to my mind, to have to support a judgment which has been based on a wrong reason. It cannot be forgotten that the husband admitted having had sexual intercourse with Mrs. Reeves before his marriage, and that of their relations after the marriage, the commissioner says: "I think the wife was amply justified in concluding that "adultery between her husband and Mrs. Reeves had taken "place." He is there referring to the period after the marriage, between 1943 when the husband left his wife, and 1945 when he returned. So far as I can see, reading the evidence, the husband never did anything to remove that belief except to tell his wife that Mrs. Reeves had in 1944 become engaged to a Belgian sergeant and that she and her husband, the Belgian, had gone to Belgium sometime in 1945—the year when the husband wanted to come back to his wife—or early in 1946. It looks as if when Mrs. Reeves decided to marry the Belgian, the husband decided to go back to his wife.

(1) 15 P. D. 159.

(2) 3 Sw. & Tr. 516.

[His Lordship gave reasons for thinking that cohabitation was, in fact, resumed and continued.]

I therefore think that the wife has failed to establish desertion for the necessary three years and that the appeal should be dismissed.

COHEN L.J.: I agree.

Appeal dismissed.

Solicitor for the wife: *J. C. Hodgson, Law Society Services Divorce Department.*

Solicitors for the husband: *Musson & Co.*

L. F. J. McD.

RUSSELL *v.* ATTORNEY-GENERAL.

1949
Apr. 28.
Barnard J.

Legitimacy—Validity of marriage of petitioner's parents—Requirement of twenty-one days' notice of marriage—Presumption of validity—Marriage Act, 1823 (4 *Geo.* 4, *c.* 76), *s.* 22—*Marriage Act,* 1836 (6 & 7 *Will.* 4, *c.* 85), *ss.* 10, 42—*Marriage Act,* 1898 (61 & 62 *Vict. c.* 58), *ss.* 1, 4, 6, 15.

On a petition for a declaration of legitimacy a question arose as to the validity of the marriage between the petitioner's parents. They had gone through a ceremony in a Roman Catholic Church and had lived together as husband and wife for many years; but there was some doubt whether the full twenty-one days' notice had been given to the registrar prior to the ceremony and there was evidence that the registrar himself had considered the marriage to have been invalid. This view was later taken by the Minister of Health, who refused a widow's pension to the petitioner's mother; but because the records had been lost or destroyed, there was no direct documentary evidence to show that the twenty-one days had not elapsed. There was no evidence that the priest who had officiated at the ceremony was not a "duly authorized "person," and the parties themselves were unaware of any irregularity.

Held, that in the absence of decisive evidence to the contrary the validity of the marriage should be presumed.

The petitioner, Leo Russell, was born a natural-born subject of the King in 1916 and was at the time of the filing and hearing of the petition domiciled in England. His father,

1949
RUSSELL
v.
ATTORNEY-GENERAL.

Ernest Russell, was married to his mother, then Florence Mary Atkins, spinster, on August 3, 1912, at a Roman Catholic church. There were nine children.

The petitioner's father died in October, 1941; and in 1942 an application by the petitioner's mother for a widow's pension was refused by the Ministry of Health on the ground (held in this suit to have been an erroneous ground) that the marriage had not been lawfully celebrated. The referee had found that the requisite twenty-one days' notice had not expired and that the registrar had been absent from the ceremony.

No question of title to property arose on the petition.

Notice of the intended marriage was given to the registrar by the petitioner's mother in the early part of July, 1912; but she could not remember the exact date. The relevant marriage notice book had been lost or destroyed. The banns were regularly called on July 14, 21, and 28, 1912; and the registrar was informed of the date fixed for the ceremony, which he did not attend.

There appeared, however, to have been some doubt whether or not the sufficient twenty-one days' notice had been given prior to the ceremony, which took place on August 3, 1912. The registrar seemed to have thought that the marriage was an invalid one, no doubt for that reason. Moreover, when the various children were born of this union, the mother went to see the same registrar in order to register their births, and in the certificates of birth of all the children the name of the father was left blank and the name of the mother was given as Florence Atkins, which was her maiden name, and she was also described as "Florence Atkins" in column seven of the certificate, which is for the "signature, description "and residence of the informant."

Richard O'Sullivan K.C. and *William Latey* for the petitioner. The suggestion made in the Ministry of Health inquiry, as a result of which Mrs. Russell was refused a widow's pension in 1942, was that the twenty-one days' notice prescribed before the marriage could take place had not expired. As the bride was a Roman Catholic and the bridegroom a Protestant the former had to obtain a dispensation from the Roman Catholic bishop before the first banns were called. The banns were called on Sundays, July 14, 21 and 28, 1912, and the marriage took place on Bank Holiday, August 3, 1912.

1949

RUSSELL
v.
ATTORNEY-GENERAL.

As all the marriage register records had been lost or destroyed there was no documentary evidence to show that the twenty-one days had not expired. The principle of law is well established that where there is evidence of a ceremony of marriage having been celebrated, followed by the cohabitation of the parties, everything necessary for the validity of the marriage would be presumed, in the absence of cogent evidence to the contrary, even though it might be necessary to presume the grant of a special licence: *Piers and De Kerriguen* v. *Piers* (1); *Spivack* v. *Spivack* (2); *Aronegary* v. *Vaigalie* (3); *Sichel* v. *Lambert* (4). Therefore if there was no cogent evidence to the contrary it must be presumed that the twenty-one days' notice had expired.

Secondly, although the Marriage Act, 1836, ss. 20 and 42, provided that such a ceremony should take place in the presence of a registrar of marriages, the Marriage Act, 1898, s. 4 dispensed with the presence of a registrar if the ceremony took place in the presence of a "duly authorized person," who had been authorized for the purpose by the trustees or other governing body of the building under s. 6, sub-s. 3. By s. 1, sub-s. 3, of the Act of 1898 such authorizing persons in the case of Roman Catholic registered buildings included the bishop or vicar general of the dioceses. In as far as s. 42 of the Act of 1836 rendered marriages void by reason of the absence of the registrar it was repealed by s. 15 of the Act of 1898. Therefore it must be assumed that in the absence of evidence to the contrary the priest who officiated in the present case was the "duly authorized person."

Apart from these considerations it has been held in pursuance of s. 22 of the Marriage Act, 1823, which dealt with marriages by banns in the Church of England, that a marriage is not void for informality unless both parties were aware of the irregularity: *Greaves* v. *Greaves* (5). The same, principle has been applied in regard to a Roman Catholic marriage: *In the Goods of Andrew Knox* (6); and s. 42 of the Marriage Act, 1836, imported almost the same words as s. 22 of the Act of 1823. Here there was evidence to show that the husband had no knowledge of the irregularity, if there were any.

John Foster for the Attorney-General. Having regard to s. 1, sub-s. 3, of the Marriage Act, 1898, and the regulation as to an "authorized person" in St. R. & O., 1909, No. 1332, the court may take the view that the priest here was an "authorized person," there being no evidence to the contrary. If the court could not accept that presumption, it might consider that the principle that both parties must "knowingly "and wilfully intermarry" with knowledge of the irregularity applied in this case. There were, however, two more or less recent decisions which seemed to be in conflict as to the presumption: *Re Taplin, Watson* v. *Tate* (1); *Re Bradshaw, Blandy* v. *Willis* (2). As regards the birth certificates having been made out as if the children were illegitimate the registrar was under the impression that the marriage was invalid; but that impression might have been erroneous.

---

(1) (1849) 2 H. L. C. 331.
(2) (1930) 46 T. L. R. 243.
(3) (1881) 6 App. Cas. 364.
(4) (1864) 15 C. B. (N. S.) 781.
(5) (1872) L. R. 2 P. & M. 423.
(6) (1889) 23 L. R. Ir. 542.

BARNARD J. (after referring as above to the facts). It is clear from the authorities which have been cited to me that where there is evidence of a ceremony of marriage having been performed, followed by a cohabitation of the parties, the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary. It would be both tragic and chaotic if such a ceremony could, on slender evidence, be declared null and void. On the evidence before me I am satisfied that the presumption ought to prevail. There is no decisive evidence before me to the contrary: there is only the evidence that the registrar seemed to think it was an invalid marriage and that he acted accordingly, and that much later on, the Ministry of Health—no doubt with a proper desire to safeguard public money—was not satisfied on the death of the petitioner's father as to the validity of the marriage and refused to grant the widow a pension. But, as I say, I am satisfied that the presumption of law should prevail and that there is no cogent evidence here to rebut it.

I therefore find that the ceremony which took place between the petitioner's parents on August 3, 1912, was a valid marriage and that the petitioner is a lawful child of the parties to that marriage.

Declaration as prayed, the name of the petitioner to be in the decree as "'Leo Russell Atkins' known as "'Leo Russell'."

Solicitors: *Seton Pollock, Law Society* (*Services Divorce Department*); *Treasury Solicitor.*

J. B. G.

---

(1) [1937] 3 All E. R. 105.

(2) [1938] 4 All E. R. 143.

VERE-WARDALE, Decd.

VERE-WARDALE *v.* JOHNSON and Others.

1949
June 29.
Willmer J.

Probate—Evidence—Admissibility—Evidence to rebut that of attesting witnesses.

The evidence of the attesting witnesses to a will is not necessarily conclusive, and the court is competent to receive evidence in rebuttal.

Where, therefore, the attesting witnesses gave evidence that the testatrix did not append her signature to the will until after they themselves had subscribed their names, it was held that evidence might be called to show that they were in error.

The plaintiff sought the revocation of a will, the attestation clause of which read: "Signed by the said (testatrix) in "our joint presence and by us in her presence and the presence "of each other" and called the attesting witnesses, who gave evidence that they had subscribed their signatures to the will before the testatrix. The defendants sought to call a solicitor's clerk and another witness, who were present when the will was signed, to give evidence tending to show that the witnesses were mistaken. It was submitted by the plaintiff that such evidence would be inadmissible.

Fairweather for the plaintiff.
Rodger Winn for the defendants.

Willmer J. I am asked to rule that, having heard the evidence of the two attesting witnesses to this will, it is not competent for me to receive the evidence of any other witnesses with regard to the attestation of the will. The two attesting witnesses have both given evidence that they in fact subscribed their names to the will before the testatrix appended her signature; and if that were the true state of the facts it would be clear that this will was not attested in accordance with the provisions of the Wills Act, 1837, and it would not be competent for me to admit it to probate. But counsel for the defendants has indicated to me that other evidence is available to show that the attesting witnesses are in error in saying what they have said to me in their evidence.

The question is whether, in the circumstances, it is

1949

VERE-WARDALE DECD.

VERE-WARDALE, v. JOHNSON.

Willmer J.

competent for me to receive that evidence. It is submitted by counsel for the plaintiff that when the attesting witnesses have given their evidence, it is conclusive. He has based that submission largely on the argument that no presumption arises in this case because of the peculiar wording of the attestation clause.

There is not a wealth of authority on the subject. I have been referred to page 127 of Mr. Mortimer's book on Probate Law and Practice, 2nd ed., and I have had the opportunity of looking at the two cases there cited, namely, *Young and Smith* v. *Richards* (1) and *Burgoyne* v. *Showler* (2). It is clear that neither of those cases goes quite so far as the proposition stated in Mr. Mortimer's text. On the other hand, I am bound to regard Mr. Mortimer's text as itself a very authoritative contribution to the law of England. I have been referred to one other case, namely, *Wright* v. *Rogers and Goodison ; Winterburn intervening* (3). That case, particularly the passage at p. 682 which is relied on, seems to make it clear that the presumption of law in favour of due execution exists notwithstanding the wording of the attestation clause. It adds—to paraphrase, the wording of the judgment in the sense in which I understand it—that the presumption is greatly strengthened if there is a perfect attestation clause. The next point, which appears in the next sentence, is as follows: "Where both the witnesses swear "that the will was not duly executed and there is no evidence "the other way, there is no footing for the court to affirm "that the will was duly executed." The important words, to my mind, in that context, are "and there is no evidence "the other way." If it were not competent to call other evidence in addition to that of the attesting witnesses those words would have been otiose, and I cannot imagine Lord Penzance inserting those words in his judgment unless his view was that it was competent to call other witnesses on this question in addition to the attesting witnesses. Although that case is not cited in support of the broad proposition in Mr. Mortimer's book, it lends some support to it.

A word about the attestation clause. I have always understood that no particular form of words was required for the attestation clause, and, indeed, the statute says so. Counsel for the plaintiff has attacked the attestation clause in this case, which he claims to be in an unusual form; but

(1) (1839) 2 Curt. 371.

(2) (1844) 1 Rob. Ecc. 5.

(3) (1869) L. R. 1 P. & M. 678.

1949

VERE-WARDALE, DECD.
VERE-WARDALE v. JOHNSON.

Willmer J.

it appears to be similar to that which is used in some of the cases to which I have been referred, and to be in accordance with the common precedent in Key and Elphinstone. I do not consider in the circumstances that I can draw any inference from the peculiar wording of the attestation clause.

It appears to me that the object of the legislature in imposing the strict formalities required by the Wills Act, 1837, was to prevent fraud. My duty here is to do all that I can to see that no fraud is perpetrated; and if I exclude further evidence such a ruling can only assist the possibility of the perpetration of fraud.

In the circumstances it is my opinion that it would be quite wrong, and not in accordance with authority, to exclude such further evidence with regard to the attestation of this will as may be available. Accordingly I decline to rule that it is not competent for the propounders of this will to adduce further evidence. They are at liberty to do so.

Solicitors for the plaintiff: *Daybell & Lynde.*
Solicitors for the defendants: *Rawlinson & Son.*

J. B. G.

MACRAE *v.* MACRAE.

Applied. HOPKINS *v.* HOPKINS [1951] P. 116

C. A.

1949
May 6.

Bucknill and Somervell L.JJ. and Wynn-Parry J.

Justices—Jurisdiction—Husband ordinarily resident in Scotland—Summary Jurisdiction (Separation and Maintenance) Acts, 1895 *to* 1925*—Summary Jurisdiction (Process) Act,* 1881 (44 *&* 45 *Vict. c.* 24).

Where a husband is ordinarily resident in Scotland, justices have no jurisdiction on a summons by a wife against her husband under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, served on him by virtue of s. 4 of the Summary Jurisdiction (Process) Act, 1881, claiming a maintenance order on the ground of desertion.

Forsyth v. *Forsyth* [1948] P. 125, followed.

Per Curiam:—A man can, and generally does, change his ordinary residence in the course of a day.

Decision of the Divisional Court, ante p. 272, affirmed.

APPEAL from a decision of a Divisional Court (Lord Merriman P. and Hodson J.) (1) holding that Manchester

(1) Ante p. 272.

city justices had no jurisdiction to hear a complaint by a wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, on which they had made a maintenance order on the ground that the husband had deserted his wife.

The parties were married on October 24, 1943, in Miles Platting, Manchester. The husband, having served in the Royal Air Force for thirteen years, was demobilized in 1945 and the spouses went to live in Manchester, at the house of the wife's parents, where the husband obtained employment. They continued to live there until June, 1948, except that once, after a quarrel between them, the husband went off to Inverness, Scotland, where his parents lived; but he returned shortly afterwards to his wife in Manchester. In June, 1948, the husband announced his intention of leaving his wife. On June 23 the wife spent the night away from home and, on her return on June 24, she found that her husband had left. On June 25 the husband returned for a few moments to collect his clothes and then again left. It was not known exactly on what date he left Manchester, but it was common ground that he went to Inverness.

On July 1 the wife took out a summons claiming a maintenance order on the grounds of persistent cruelty and desertion, returnable on July 13 before Manchester justices. This summons was served on the foreman of the works where the husband had been employed; but he had left that employment. The summons was reissued and served on the husband on July 15 at Inverness under the Summary Jurisdiction (Process) Act, 1881. On the same day the wife received in Manchester the following letter from her husband at Inverness: "I am writing to let you know that I have "decided to have my home in Inverness. I have got the two "rooms at the back which I will improve on. I will add a "scullery and one or two other things on to it, which will "make it independent of the main house; also I shall be "running the garden. It can be made into a nice place and "I shall have a place I can call my own. That is all I will "say now, I shall leave the rest to you. Please let me know "what you intend to do, as I would like to know one way "or the other. I will close now, hoping to have an early "reply."

At the hearing in Manchester on July 22, 1948, the wife gave evidence of ill-treatment and desertion. The husband was represented by a solicitor and a precognition by the husband was read. It dealt with his married life and continued: "Things came to such a pass recently that I "decided it was essential that my wife and I should leave "the house and I accordingly made arrangements to move "up to Inverness, where I had arranged to have furnished "accommodation in my mother's house at Thornbank, "Clachnaharry. My wife refused to accompany me. I am "living in two rooms in my mother's house. These are quite "separate from the rest of the house, in which also live my "mother and one of my brothers. My father died recently. "I have also taken up employment in Inverness and intend "settling down here." No point as to jurisdiction was taken before the justices, who said that they considered the letter received from her husband by the wife on July 15 was not genuine. They said that they preferred the evidence of the wife and made a maintenance order on the ground of desertion, which was served on the husband on July 30.

The husband appealed to the Divisional Court solely on the question of jurisdiction. There was no precise evidence as to the husband's domicile before the court. That court, following *Forsyth* v. *Forsyth* (1), held that the husband was, when the summons was issued, ordinarily resident in Scotland and so the Manchester magistrates had no jurisdiction to issue the summons or to cause it to be served or to make an order, on a complaint brought by his wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, against him. It was sufficient that the husband was ordinarily resident in Scotland: he need not have a Scottish domicile. See ante p. 272.

The wife appealed.

John Mortimer for the wife. The Divisional Court decided this case on the ground that they were bound by the decision in *Forsyth* v. *Forsyth* (1). But in that case the husband was both domiciled and ordinarily resident in Scotland. In this case there was no precise evidence as to the husband's domicile. Nor was he ordinarily resident in Scotland. He had left his wife once before, going to Scotland, but he had returned to Manchester to his home with his wife's parents, which was the only matrimonial home he had ever known since he was demobilized. In *Forsyth* v. *Forsyth* (1) there was no evidence that the husband had ever been in England at any material time. In this case the husband was resident in England at the time of the alleged matrimonial offence of desertion. He was not heard of as being in Scotland until July 15, 1948, the date of the letter he wrote to his wife and the date when the summons was served on him. The burden of proof was on the husband to prove that he was ordinarily resident in Scotland and this burden he failed to discharge. The decision in *Forsyth* v. *Forsyth* (1) was not that the mere presence of the husband in Scotland barred jurisdiction. It is plain that there was jurisdiction before the justices at the time when the offence of desertion was committed. I agree that the provision of the Summary Jurisdiction (Process) Act, 1881, cannot give jurisdiction: that Act merely empowers service of the summons in Scotland—mere machinery. See *Berkley* v. *Thompson* (2). "A man's residence . . . . is the "place or country where he, in fact, is habitually present." Dicey's Conflict of Laws (6th ed.), at p. 187. In *Levene* v. *Inland Revenue Commissioners* (3) Lord Warrington said: "I do not attempt to give any definition of the word "'resident.' In my opinion it has no technical or special "meaning for the purposes of the Income Tax Act. "'Ordinarily resident' also seems to me to have no such "technical or special meaning. In particular it is, in my "opinion, impossible to restrict its connotation to its duration. "A member of this House may well be said to be ordinarily "resident in London during the Parliamentary session and "in the country during the recess. If it has any definite "meaning I should say it means according to the way in which "a man's life is usually ordered." See also the speech of Lord Sumner in *Inland Revenue Commissioners* v. *Lysaght* (4). On July 15, 1948, this husband was ordinarily resident in Manchester, which was his matrimonial home.

---

(1) [1948] P. 125.

Harris Walker for the husband. The husband had left Manchester and transferred his ordinary residence to Scotland before July 15. A man can and does change his ordinary residence in a day. It appears from the husband's letter to his wife and from his precognition that he had transferred his ordinary residence to Scotland: he had no roots in Manchester. It is a reasonable inference that the husband was in Inverness when the summons was issued. It is clear from the judgment of Bucknill L.J. that the decision in

---

(1) [1948] P. 125.
(2) (1884) 10 App. Cas. 45, 51.
(3) [1928] A. C. 217, 232.
(4) Ibid. 234, 243–4.

Forsyth v. *Forsyth* (1) depended on the facts that the husband in that case was ordinarily resident in Scotland and this case was covered by that decision, as was held by the Divisional Court. See also *Hamilton* v. *Hamilton* (2). If this appeal succeeded, the husband could cite *McQueen* v. *McQueen* (3) to prevent enforcement of the order.

It is submitted that the husband need not be ordinarily resident in Scotland—residence is enough to bar jurisdiction before the justices.

John Mortimer replied.

BUCKNILL L.J. I will ask Somervell L.J. to give the first judgment.

SOMERVELL L.J. This is an appeal by a wife from the decision of the Divisional Court, which set aside an order which was made by Manchester city justices against the husband on the ground that he had deserted his wife. That order was set aside by the Divisional Court on the ground that the justices had no jurisdiction.

Before the justices the point as to jurisdiction was not taken. The question was, and is, whether this case is covered by the decision of this court in *Forsyth* v. *Forsyth* (3). In that case the husband was domiciled and resident in Scotland and the wife complained that he had deserted her there by remaining there after she had come to England on the understanding that he would follow her. There was no evidence that the husband was ever in England at any material time. It was held that since the husband was not shown to have been in England at any material time the justices had no jurisdiction to entertain the wife's complaint, and that decision was based on and applied the decision of the House of Lords in *Berkley* v. *Thompson* (4). Before stating the issue with greater precision I will refer to *Berkley* v. *Thompson* (4) and the argument that was there raised. That case raised the question as to the proper construction of the Summary Jurisdiction (Process) Act, 1881. Section 4 of that Act provided: "Subject to the provisions of this Act, any process "issued under the Summary Jurisdiction Acts may, if issued "by a court of summary jurisdiction in England and endorsed "by a court of summary jurisdiction in Scotland, or issued

(1) [1948] P. 125.
(2) [1949] W. N. 61.
(3) (1920) 2 S. L. T. 405.
(4) 10 App. Cas. 45, 51.

"by a court of summary jurisdiction in Scotland and endorsed "by a court of summary jurisdiction in England, be served "and executed within the jurisdiction of the endorsing court "in like manner as it may be served and executed within "the jurisdiction of the issuing court, and that by an officer "either of the issuing or of the endorsing court"; and then there are further provisions with regard to processes. Section 6 of that Act dealt with bastardy proceedings, on which the decision in *Berkley* v. *Thompson* (1) largely turned. The headnote in *Berkley* v. *Thompson* (1) is in these terms: "The Summary Jurisdiction (Process) Act, 1881, does not "enable a bastardy summons to be issued by justices in "England and served in Scotland upon the putative father "domiciled and resident in Scotland; and if a summons "is so served and the putative father does not appear before "the justices they have no jurisdiction to make a bastardy "order against him."

The argument in that case was somewhat on these lines. It was argued for the unsuccessful party, the woman, that s. 4, the opening words of which I have read, gave jurisdiction to serve a summons, although the Bastardy Acts did not, of course, apply to Scotland, and the court normally would not have had jurisdiction in respect of the putative father, if he was resident in Scotland; but the House of Lords decided that that was not the effect of s. 4, that it did not extend to jurisdiction in bastardy matters, and they to a considerable extent relied in coming to that conclusion on the special section which dealt with bastardy. That was a decision of the House of Lords on the general scope of s. 4 of the Act of 1881; and that decision was applied by this court in *Forsyth* v. *Forsyth* (2) in which case there was no evidence that the husband had ever been in England. In the present case it is agreed that the husband was in Manchester until the time when he is said to have deserted his wife, and therefore that makes a difference on which Mr. Mortimer among other things relies.

It was suggested that *Forsyth* v. *Forsyth* (2) was decided as it was because the husband was domiciled in Scotland. It was argued on the other hand that if you read the judgment of Bucknill L.J., which was the main judgment in that case, it is not based on domicile but is based on the fact that the husband was ordinarily resident in Scotland. I agree with

(1) 10 App. Cas. 45, 51.

(2) [1948] P. 125.

what the Divisional Court say about that decision and the principles which it laid down. If, in the present case, the husband was ordinarily resident in Scotland at the time when the summons was issued, then in my view this case is covered by the decision in *Forsyth* v. *Forsyth* (1). That was the view taken by the Divisional Court.

Both the learned President and Hodson J. came to the conclusion in this case that at the material date the husband was ordinarily resident in Scotland. The learned President said (2): "From the moment he travelled up to Inverness "after leaving his wife, all the evidence tends to show that he "was ordinarily resident in Scotland. The only thing that we "do not know is whether he actually got work in Inverness." The letter about the flat in his parents' house, and the statement in his precognition that he would not have given up his work in Manchester but for the reason that he realized that life in Manchester was impossible seem to me to tend in the same direction. That, it seems to me, is the right conclusion. The justices found that this man had deserted his wife. The only matrimonial home that these two had ever had was with her parents. The husband decided to leave the wife and he goes up to Scotland, where his home was, where his mother is, and he says he intends to settle there, and he describes in the letter in detail the arrangements that he is making for providing himself there with a home. In those circumstances it seems to me that only one conclusion is possible, namely, that he was ordinarily resident there at that time. The fact that the desertion took place in England and that he was ordinarily resident in England up to a short time before, does not seem to me to affect the matter. Ordinary residence can be changed in a day. A man is ordinarily resident in one place up till a particular day: he then cuts the connexion he has with that place—in this case he left his wife; in another case he might have disposed of his house or anyhow left it and made arrangements to make his home somewhere else. Where there are indications that the place to which he moves is the place which he intends to make his home for at any rate an indefinite period, then as from that date in my opinion he is ordinarily resident at the place to which he has gone. For those reasons I think the facts relied on by Mr. Mortimer do not displace the conclusion to which the members of the Divisional Court came, that this

(1) [1948] P. 125. (2) Ante p. 274.

C. A.
1949
MACRAE v. MACRAE.
Somervell L.J.

man was ordinarily resident in Scotland at the material date, and therefore applying *Forsyth* v. *Forsyth* (1) the justices had no jurisdiction.

Mr. Walker, on behalf of the husband, raised a further argument. He submitted that the justices would have had no jurisdiction even although the presence of the husband in Scotland fell short of ordinary residence. I only refer to that contention to say that I would require a good deal of argument on both sides before accepting that proposition. In considering these cases of jurisdiction it is important to distinguish between two different aspects of the subject. Is one considering a case where the court would not have jurisdiction even if the defendant was in the country and could be served; or is the case one in which the court would obviously have jurisdiction provided the defendant could be served? For instance, in actions in personam, as a rule if the defendant can be found here and served the plaintiff can proceed. But take the case of a petition for the dissolution of a marriage: if this country is not the domicile of the parties the court will not exercise jurisdiction, although the husband or the wife is here and can be served with the petition. One, therefore, has to bear that distinction in mind; and it is not clear to me, either in general principle or in particular from the wording of s. 6 of the Summary Jurisdiction (Process) Act, 1881, which deals with the somewhat similar position in bastardy, that the court here would not have jurisdiction to deal with a case of this kind where the husband, though in Scotland, was there in circumstances which fell short of ordinary residence. That point can be left to be dealt with if and when it arises, but on the first point I think that this appeal fails.

BUCKNILL L. J. I agree.

WYNN-PARRY J. I agree.

Appeal dismissed.

Solicitors for the wife: *Pritchard, Englefield & Co. for Boote, Edgar & Co., Manchester.*

Solicitors for the husband: *Mackrell, Ward and Knight.*

C. G. M.

---

(1) [1948] P. 125.

LAND *v.* LAND.

1949
June 14, 15, 16.

Lord Merriman P. and Barnard J.

Justices—Withdrawal of summons—Whether withdrawal acts as estoppel—Summary Jurisdiction (Separation and Maintenance) Acts, 1895 *to* 1925.

Where there has been a withdrawal of a summons, (not leading to an adverse adjudication), the withdrawal does not operate as an estoppel per rem judicatam; and this applies whether it be a withdrawal upon a preliminary point or upon the merits of the case. In this respect there is no valid distinction between matters of complaint under the matrimonial code and other matters of complaint dealt with by the Summary Jurisdiction Acts.

In considering whether certain dicta in *Pickavance* v. *Pickavance* [1901] P. 60, have been correctly interpreted to mean that after the withdrawal of a summons no fresh summons can be issued upon the same cause of complaint, it is necessary to examine the facts of that case in the light of s. 11 of the Summary Jurisdiction Act, 1848, wherein a distinction is drawn between "the matter of the complaint" and the "making of a complaint." The actual decision in *Pickavance* v. *Pickavance* was that the justices had no jurisdiction because the complaint upon which the later summons was issued was made more than six months after the matter of the complaint occurred. It was not said in *Pickavance* v. *Pickavance* that even though a fresh complaint were made within time, the withdrawal of an earlier summons gave rise to a plea of autrefois acquit and to an estoppel per rem judicatam: the suggestion in subsequent cases that certain dicta of Sir Francis Jeune P. had that meaning was mistaken, and a false gloss had been put upon the case.

Hopkins v. *Hopkins* [1914] P. 282, being based upon such a misapprehension, held not to be binding upon the court, and not followed.

At the hearing of a summons for maintenance under the provisions of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, on the ground of desertion, the complainant withdrew her summons after she had been cross-examined. There was no adjudication by the court upon the evidence which had been heard. There was no resumption of cohabitation, and the wife subsequently made a similar complaint; an order was then made in her favour upon the ground that her husband had deserted her. The husband appealed.

Held, that the justices had jurisdiction to make the order notwithstanding the withdrawal of the earlier summons.

HUSBAND'S appeal to the Divisional Court against a decision of the justices for the City of Manchester, who made an order against him on March 29, 1949, on the ground of desertion, and awarded the wife 30s. 0d. a week maintenance. The wife had left her husband in April, 1946.

On June 3, 1948, a different panel of these justices had heard evidence by the wife that she had been constructively deserted by her husband. She told the court at the close of her cross-examination on that occasion that she wanted maintenance not for herself but for the child of the marriage; and before the case proceeded further she withdrew her summons. Very shortly afterwards she took out a summons under the Guardianship of Infants Act, 1925, in respect of the said child, and an order was made for an agreed sum of 12s. 6d. a week.

On March 29, 1949, on a further complaint by the wife, the justices made the order referred to above. They said, in giving their reasons for their decision, that they found themselves satisfied that "the defendant by reason of his "association with other women, coupled with his behaviour "towards the complainant, fully justified her in leaving him, "and that he by his conduct was guilty of desertion." The wife was represented by a solicitor, who had no knowledge of the previous proceedings which were, therefore, not brought to the attention of the justices: the husband did not appear, and there was no legally valid reason for his non-attendance.

The husband appealed on the grounds that the finding of the justices was against the weight of the evidence, that the justices were wrong in law in finding desertion, and that "the matter of complaint upon which the said order was "made was before the justices of the said city on June 3, "1948, when the said respondent Winifred Land uncondi-"tionally withdrew the said complaint."

There was no resumption of cohabitation between the two hearings nor, indeed, had there been any cohabitation since April, 1946.

The wife's evidence was that the parties were married in August, 1944, and that a child was born in January, 1945. The wife said that she left her husband in April, 1946, and that for the last ten months of the marriage he had refused to speak to her and had made it clear in that and other ways that he wished to have no more to do with her. She referred at the hearing in June, 1948, to a meeting with her husband in Manchester in August, 1947, when he had asked her to return to him, and she had consented to do so if he would find a home of their own. She added that he had written a few weeks later to say that he was unable even to find rooms, much less a house; but that they had met several times since and had been quite friendly. No reference to these meetings, however, was made at the proceedings in March, 1949.

Gore for appellant. On the authority of dicta in *Pickavance* v. *Pickavance* (1) I ask the court to hold that the matter was res judicata. The first summons was withdrawn unconditionally and there were no fresh occurrences between the two summonses.

[LORD MERRIMAN P. The court may have reached its decision in *Pickavance* v. *Pickavance* (1) because no offence took place within the statutory six months, and not because the matter was res judicata. It may be very important to keep the two questions separate.]

(The facts and dates in *Pickavance* v. *Pickavance* (1) were examined.)

Pickavance v. *Pickavance* (1) was first discussed in *Stokes* v. *Stokes* (2).

[LORD MERRIMAN P. That was clearly a case of res judicata.]

Pickavance v. *Pickavance* (1) was followed in *Hopkins* v. *Hopkins* (3), where it was referred to (at p. 285) as "a very "valuable decision." (Reference was also made to *Kenney* v. *Kenney* (4); *Molesworth* v. *Molesworth* (5); and *Owens* v. *Minoprio* (6).)

J. E. S. Simon for respondent. In considering the problem of estoppel raised by *Pickavance* v. *Pickavance* (1) it is submitted that the court leans against estoppel, for it tends to shut out the truth. "The proceedings must have resulted in "a judgment or decree . . . . A verdict, not followed by "judgment, will not create an estoppel." (Halsbury's Laws of England, Hailsham ed., vol. 13, p. 446.) This proposition is pursued at p. 446: "The dismissal of an action for want of prosecu- "tion is no bar to a new action." If want of prosecution is no bar, a fortiori there should be no estoppel by a withdrawal. The question is, has the defendant not only been put in peril, but has he in substance been acquitted?

Discontinuance or non-suit at common law does not create an estoppel; nor does it in equity—*Massam* v. *Thorley's Cattle Food Co.* (1); nor in bastardy cases—*R.* v. *Seddon and Others, Ex parte Hall* (2); nor in criminal proceedings before judgment—*Davis* v. *Morton* (3), *Owens* v. *Minoprio* (4), *R. (McDonnell)* v. *Justices of Tyrone* (5). The dismissal of a petition for divorce, otherwise than after adjudication on the merits (e.g., before trial at the suit of the petitioner, or at the trial on the ground of collusion), does not prevent a decree being granted on a fresh petition presented on the same ground as before.

---

(1) [1901] P. 60.
(2) [1911] P. 195.
(3) [1914] P. 282.
(4) (1925) 41 T. L. R. 571.
(5) [1947] 2 All E. R. 842.
(6) [1942] 1 K. B. 193.

If, therefore, the withdrawal of a matrimonial summons before justices creates an estoppel, it is quite anomalous.

Pickavance v. *Pickavance* (6) has been criticized in several reported cases, some of which are referred to above, and, indeed, in *Owens* v. *Minoprio* (4), Lord Caldecote C.J. appeared to allow nothing of the obiter dictum in *Pickavance* v. *Pickavance* (6) to remain, holding that that case was no more than a decision that the second information was out of time.

In *R. (McDonnell)* v. *Justices for Tyrone* (5) (a poaching case) it was held that "an order of justices permitting a "summons for an offence punishable on summary conviction "to be withdrawn does not amount to an acquittal of the "defendant, and a fresh summons may subsequently be "issued for the same offence. The statement in *Pickavance* "v. *Pickavance* (6) that the withdrawal of a summons puts "an end to the complaint, dissented from." The case is of twofold importance: it has been expressly approved by the King's Bench Divisional Court—see *Davis* v. *Morton* (3); *Owens* v. *Minoprio* (4)—and the summons was not withdrawn on technical grounds.

[LORD MERRIMAN P. In so far as *Pickavance* v. *Pickavance* (6) is said to hold that a withdrawal is an end of the matter, it clearly went too far. But what of an unconditional withdrawal while the accused is in peril?]

A withdrawal is not equivalent to a dismissal. The real issue in each case is, not whether the defendant has been in peril, but whether there has been a judgment which has put him in peril. A matter must pass into rem judicatam before estoppel can arise.

---

(1) (1880) 14 Ch. D. 748, 751.

(2) [1916] W. N. 63; 85 L. J. (K. B.) 806; 32 T. L. R. 279.

(3) [1913] 2 K. B. 479.

(4) [1942] 1 K. B. 193.

(5) [1912] 2 I. R. 44.

(6) [1901] P. 60.

The case which causes most difficulty to the respondent is *Hopkins* v. *Hopkins* (1), but although it purports to follow dicta in *Pickavance* v. *Pickavance* (2) Sir Samuel Evans P. cited with approval (3) in his judgment a long passage from *R.* (*McDonnell*) v. *Justices for Tyrone* (4) against it. It is submitted that *Hopkins* v. *Hopkins* (3) was a decision upon the facts of that case, in which persistent cruelty was alleged, and that the earlier withdrawal which was being considered was in fact a dismissal, for the complainant's case had broken down.

(Counsel also referred to *Kenney* v. *Kenney* (5); *McGregor* v. *Telford* (6); *Foster* v. *Howell* (7): the last a case where an earlier dismissal was not on the merits, and where on an information subsequently laid by a constable the defendant was found guilty. There was no certificate of dismissal on the first trial.)

(Argument was then directed to the merits of the case, and it was not disputed that a rehearing might be necessary as the justices had not been made aware in March, 1949, of the previous withdrawal nor of certain relevant evidence then given.)

Gore in reply. *Davis* v. *Morton* (8) and *Owens* v. *Minoprio* (9) were criminal cases in which the previous proceedings had been vitiated by a technicality. In *R.* (*McDonnell*) v. *Justices for Tyrone* (4), it is made clear at p. 49 that *Pickavance* v. *Pickavance* (2) applied to husband and wife cases. In *Pickavance* v. *Pickavance* (2) the court took time to consider its decision on this very question of withdrawal and estoppel.

[LORD MERRIMAN P. The exact wording of s. 11 of the Summary Jurisdiction Act, 1848, is important. Sir Francis Jeune P. said (10): "I am clearly of opinion that the effect of "the withdrawal" . . . . "was to put an end to the com-"plaint," not "an end to the cause of complaint."]

The cases cited against me are to be distinguished: the summons, for example, was withdrawn for a technicality, there were bastardy and criminal matters under consideration, etc.

(1) [1914] P. 282.
(2) [1901] P. 60.
(3) [1914] P. 282, 284.
(4) [1912] 2 I. R. 44.
(5) 41 T. L. R. 571.
(6) [1915] 3 K. B. 237.
(7) (1869) 33 J. P. 629.
(8) [1913] 2 K. B. 479.
(9) [1942] 1 K. B. 193.
(10) [1901] P. 60, 63.

In husband and wife cases the possibility of a reconciliation arises, and the withdrawal of such a summons may be conditional upon an attempt at reconciliation.

LORD MERRIMAN P. after stating the facts above set out and pointing out the difficulties occasioned by the fact that at the hearing on March 29, 1949, the justices had not been informed of the previous proceedings on June 3, 1948, nor of the evidence then given; and stating that there was no adjudication in the ordinary sense of the term on June 3 and that the summons was marked "withdrawn," proceeded: The second and much more difficult and formidable point, which has been argued with great force, is that on the authorities, so far as they relate to this matrimonial jurisdiction, the withdrawal of the first summons on June 3, 1948, precluded the wife from saying thereafter that she had been deserted by her husband when she left him in April, 1946. That argument originates with *Pickavance* v. *Pickavance* (1). In a series of cases, to some of which it will be necessary to refer, attention has been drawn to the distinction between what was actually decided in *Pickavance* v. *Pickavance* (1) and what was supposed to have been laid down obiter in that case; and as the decision of this case one way or the other turns on what I will call the gloss which has been put on *Pickavance* v. *Pickavance* (1), in relation to this jurisdiction in particular, I think that it is necessary to examine a little closely what was the real point of that case. It may seem elementary, but I think the proper method of approach here is to begin with the statute of 1848, which lays down a time-limit in respect of the jurisdiction of justices (ignoring the provisions relating to informations) to deal with any complaint, including complaints by married women under the matrimonial code which begins with the Summary Jurisdiction (Married Women) Act, 1895. The Act of 1848 makes it quite clear that as a matter of procedure the process begins by what is called "the making of a complaint." The "complaint" is made in respect of something which is called "the matter "of the complaint," and by s. 11 ". . . . such complaint "shall be made . . . . within six calendar months from "the time when the matter of such complaint . . . . arose." The section, therefore, draws the plainest distinction between on the one hand what is called "the matter of the complaint" and on the other hand, what is called "the making of the "complaint," which is the physical process which initiates the jurisdiction of the court, and upon which the court may issue a summons, thereby bringing the defendant before it. It is obvious that "the matter of the complaint" must necessarily precede, in point of time, "the making of the "complaint," and it is very necessary in relation to the matrimonial jurisdiction, with which we are concerned, to draw the next important distinction, which is between matters of complaint which in their nature are continuous and matters of complaint which in their nature must have come to an end at some definite point of time. The simplest illustration, which is directly in point in connexion with *Pickavance* v. *Pickavance* (1) (with which I shall deal shortly), is between a case of persistent cruelty on the one hand and a case of desertion on the other. Desertion is a continuous offence, and once it is shown to have begun and not to have been interrupted, the question of a time-limit preventing the making of a complaint otherwise than within six calendar months from the time when the matter of the complaint arose, does not come into the question, because it is always possible, so long as the desertion continues, to say that the matter of complaint has arisen within six months. But it is quite otherwise in cases where a course of persistent cruelty is alleged. Speaking generally, a course of persistent cruelty must have an ingredient which is the last of the series, which must be, in other words, the end of "the matter of the complaint." After six months from that point of time it is too late to make a complaint before a court of summary jurisdiction, and it is too late for the court, if such a complaint is made, to issue a summons and so to found its jurisdiction.

---

(1) [1901] P. 60.

With these elementary considerations in mind, I come back to *Pickavance* v. *Pickavance* (1). That was a case of persistent cruelty. The head-note reads: "The withdrawal "of a summons under the Summary Jurisdiction (Married "Women) Act, 1895, has the effect of putting an end to the "complaint"—I emphasize "the complaint"—"in respect "of which it is issued, and, after the withdrawal, no fresh "summons can be issued upon the same cause of complaint." I pause there to make another general observation. I have already pointed out that in the case of a continuing offence the time-limit, in the nature of things, cannot apply; but there is the intermediate case in which, although the offence is one which must, in the nature of things, come to an end on a particular date, the complaint may be made well within the six months, the summons issued thereon, be heard well within the six months, and be withdrawn in time for another complaint to be made, also within the six months. I am at the moment concerned to show that, in my opinion, the court was never even considering that possible case in *Pickavance* v. *Pickavance* (1), and that the head-note, in so far as it says that after the withdrawal no further summons can be issued upon the same " cause of complaint," goes too far. In that particular case there is no doubt that the earlier complaint in respect of the persistent cruelty was within time. The summons issued thereupon was withdrawn, and a fresh complaint made, upon which the later summons was issued, outside the six months time-limit. It was not suggested in the argument that there was any question of estoppel per rem judicatam, or, in particular, that the plea of autrefois acquit arose. On the contrary, the whole argument was this, that as the later complaint had not been made within six months of the parties living together, the justices had no jurisdiction, and in my opinion, but for one word in the judgment, that, and nothing else than that, was what would seem to have been in the minds of the learned judges who decided that case. Both in his observations before adjourning for consideration and in the opening sentence of his judgment, Sir Francis Jeune P. referred to the question whether the withdrawal of the summons amounted to a complete withdrawal of the complaint so that it could not be proceeded upon, not whether it amounted to an estoppel per rem judicatam or to a previous acquittal upon the cause of the complaint. In my opinion he was dealing purely with the machinery point that, through withdrawal of the summons, the complaint made, upon which the summons was issued, ceased to exist, and some fresh complaint was necessary. As the fresh complaint could only be made out of time the justices had no jurisdiction, and the only ground on which the much more serious implication which has been directed to this decision is based is in one word of one sentence at p. 64. After calling attention (2) to the important fact that " the " withdrawal of a summons can only take place by leave of the " justices or magistrate: a complainant cannot put an end

---

(1) [1901] P. 60.

---

(1) [1901] P. 60.

(2) Ibid. 60, 64.

1949

LAND
v.
LAND.

Lord Merriman P.

"to a criminal proceeding except by leave of the court, and if "that leave is given and the summons is withdrawn that "amounts to a consent by the court," the President adds (1): "And that involves the obvious effect that the complaint "upon which the summons was founded necessarily falls "to the ground." In that sentence the President quite clearly meant to refer to the physical fact of making the complaint, not to the matter of the complaint. But he continues: "The court, having once given its consent to "the withdrawal, cannot be competent to revive it again "by issuing a fresh summons on the same ground." That is the sentence which has given rise, in my opinion, to the whole of the confusion. It need mean nothing more than this, applied to the facts of that particular case, that the justices could not entertain a fresh complaint on the same ground out of time. Speaking for myself, I do not believe that that court were thinking of autrefois acquit or estoppel per rem judicatam at all. It is quite clear, as has been pointed out over and over again, that the decision was simply on the question that the second complaint was out of time, and the summons issued upon it therefore gave the justices no jurisdiction.

But whether I am right or wrong in thinking that something has been attributed to Sir Francis Jeune P. and Gorell Barnes J. of which they were never thinking is, perhaps, academic, because there is not the slightest doubt that a gloss has been put upon that judgment in the sense that it has been suggested that they were saying that in all the circumstances, even though a fresh complaint could be made within time and a fresh summons issued within time, the withdrawal of a summons gave rise to the plea of autrefois acquit and to an estoppel per rem judicatam. That gloss was first put upon the judgment in the Irish case of *R. (McDonnell)* v. *Justices for Tyrone* (2). That was a poaching case where a summons had not been proceeded with and another one had been issued, and it was held that the court could proceed to conviction notwithstanding the withdrawal of the previous summons. In his judgment (3) Palles C.B. drew the distinction between the real decision in *Pickavance* v. *Pickavance* (4) (that the complaint on which the summons was issued was out of time) and what I call

(1) [1901] P. 60, 64.
(2) [1912] 2 I. R. 44.
(3) Ibid. 49.
(4) [1901] P. 60.

1949

LAND
v.
LAND.

Lord Merriman P.

the gloss upon the judgment in that case and he says (1): "If, however, we apply the principle laid down in that decision "to the withdrawal of any summons for a criminal offence, "we would impose a fetter upon the administration by "justices of the criminal law, which derives no support either "from statute or from analogy in common law; and to do "so would, in my opinion, be opposed to the long line of "authorities which define and limit the application of the "common law pleas of autrefois convict and autrefois "acquit"; and he makes it plain that he is not prepared to follow what he supposes to have been the reasoning on which that decision was based.

That brings me to the other case which we must consider. That case is the decision of this court in *Hopkins* v. *Hopkins* (2). It is only necessary to add that by the time *Hopkins* v. *Hopkins* (2) came to be decided a Divisional Court of the King's Bench Division in *Davis* v. *Morton* (3) had held that the withdrawal of a summons in the course of proceedings which had become irregular, because the defendant had not been informed, as required by s. 17 of the Summary Jurisdiction Act, 1879, of his right to be tried by a jury, did not prevent further proceedings regularly instituted on the same subject matter. Without reading the judgment, the point is sufficiently summarized in the last paragraph of the head-note: "The dictum in *Pickavance* v. *Pickavance* (4), that "the withdrawal of a summons by leave of the court puts "an end to the complaint upon which the summons is founded, "does not apply where the withdrawal is owing to a technical "informality in the proceedings on the hearing of the "complaint." That omits to notice the distinction, which I have already pointed out in another form, between the withdrawal of a complaint which is in time and substituting for it the making of a complaint which is out of time, and the case where although the first complaint is withdrawn, another complaint within time is substituted.

Hopkins v. *Hopkins* (4) was, however, another case of persistent cruelty. There had been altogether three summonses. The first may, I think, be treated as irrelevant, because to my mind it is reasonably clear from the judgment that there had been a resumption of cohabitation, and presumably there had been some fresh acts of alleged cruelty after the issue of the first summons. The two summonses that mattered were issued respectively on April 11, 1914, and July 4, 1914. Both were based upon a complaint made of what was admitted to be identically the same course of persistent cruelty. The April summons was withdrawn, and the question which had to be decided was whether the order based upon the July summons could stand. After stating the history of the summonses Sir Samuel Evans P. says (1): "The facts in this case are very similar to those "in *Pickavance* v. *Pickavance* (2)." Now, if I have made myself clear so far, those facts were essentially different in this respect: that there is nothing whatever to show that in respect of the alleged course of persistent cruelty the summons of July 4, 1914, and the complaint upon which it was based, were not as much in time as had been the summons and the complaint, upon which it was based, of April 11, 1914. The President read at length the passage in *R.* (*McDonnell*) v. *Justices for Tyrone* (3) to which I have already alluded and said that he agreed with it (4), and he referred also to the fact that *Pickavance* v. *Pickavance* (2) had been considered, not only in Ireland, but in this country, in *Davis* v. *Morton* (5), to which I have just referred. He then said this (4): "Upon "the whole I think we ought in cases between husband and "wife not to depart from the opinion solemnly expressed "by our two eminent predecessors. But it is not every "withdrawal of a summons that necessarily disposes of the "right of a wife on similar facts to take further proceedings. "The withdrawal might be on conditions. In this case the "justices seem to have been under a complete misapprehension "when they say the first summons was adjourned. It was "withdrawn and it is so marked. It was withdrawn "absolutely, and without conditions. In these circumstances "we are of opinion that the last summons should have been "dismissed." And although I need not refer to the case at length, there is an illustration of a summons which was withdrawn on conditions in *Molesworth* v. *Molesworth* (6) which was heard in this court, and where we held that whatever be the rights or wrongs of the decision in *Pickavance* v. *Pickavance* (2), *Molesworth* v. *Molesworth* (6) was clearly a case in which the withdrawal had been upon conditions.

---

(1) [1912] 2 I. R. 44, 49.
(2) [1914] P. 282.
(3) [1913] 2 K. B. 479.
(4) [1901] P. 60, 64.

(1) [1914] P. 282, 283.
(2) [1901] P. 60.
(3) [1912] 2 I. R. 44, 48, 49.
(4) [1914] P. 282, 285.
(5) [1913] 2 K. B. 479.
(6) [1947] 2 All E. R. 842.

To return to the judgment in *Hopkins* v. *Hopkins* (1). Bargrave Deane J. made it plain that he considered that *Pickavance* v. *Pickavance* (2) established estoppel per rem judicatam, for he said (3): "So far as causes of complaint "between husband and wife under this particular Act are "withdrawn unconditionally, husbands ought to be for ever "relieved from the same cause of complaint under this Act." Observe that he talked about the same "cause of complaint," and not the same "complaint." He proceeded: "I do not "say that a wife should not be able to bring up here, to obtain "relief, coupled with adultery, charges which may have been "withdrawn in a court of summary jurisdiction; but such "withdrawal should, in my opinion, be an estoppel from "bringing up again the same cause of complaint before the "justices."

There is the problem in its naked simplicity. It is this: whether there is some different code of law applicable to matrimonial matters, although dealt with under a summary jurisdiction code of general application, or whether there is not. The position as I see it is this: If *Pickavance* v. *Pickavance* (2) has been misunderstood, and if a false gloss has been put upon it, then we are plainly absolved from following *Hopkins* v. *Hopkins* (1). If, on the other hand, *Hopkins* v. *Hopkins* (1) rightly interpreted the decision in *Pickavance* v. *Pickavance* (2) and there are two decisions of this court (or, to be more accurate, one decision of this court in *Hopkins* v. *Hopkins* (1) based on dicta not necessary to the decision of *Pickavance* v. *Pickavance* (2)), ought we to follow it, although it is plainly shown to be out of line with the law relating to estoppel per rem judicatam in relation to both civil and criminal cases? I say "plainly shown" because the decision in *R.* (*McDonnell*) v. *Justices for Tyrone* (4) has been followed not only in *Davis* v. *Morton* (5) but even more recently in *Owens* v. *Minoprio* (6), and, I ought to say in passing, received very marked approval from a Divisional Court of the King's Bench Division in *R.* v. *Seddon and Others, Ex parte Hall* (7). The only thing, in my opinion, that gives any cause for hesitation is that cases in which *Pickavance* v. *Pickavance* (2) has been commented on have been dealt with on the ground, as in *Davis* v. *Morton* (1), that there was a technical defect in the procedure which had developed at the moment when the summons was withdrawn, or on the ground, as in *Owens* v. *Minoprio* (2), that the information had been laid by the wrong prosecutor. Lord Caldecote C.J. said in *Owens* v. *Minoprio* (3), after referring to *R.* (*McDonnell*) v. *Justices for Tyrone* (4) and *Davis* v. *Morton* (1): " Those are actual " decisions that when a withdrawal of a summons is permitted " by justices, not on the merits of the case, but on a preliminary " point, the withdrawal is not equivalent to a dismissal or " an acquittal " (as was stated by Pickford J. in his judgment in *Davis* v. *Morton* (5)); and Lord Caldecote C.J. went on to say: " The basic principle of the plea autrefois acquit is that " the person charged has already been put in peril, and no " man is to be put in peril twice in respect of the one charge. " In the present case there was no withdrawal of the " first summons on the merits. There was a withdrawal " with the consent of the justices, in consequence of an " informality in the proceedings. To correct that informality " a second information was laid by a different person " ; and he added (6) that he thought that it was " highly desirable " that *Pickavance* v. *Pickavance* (7) should no longer appear in " the text-books as an authority to the effect stated by the " justices in their first decision, and that it should be " appreciated that the only decision in the case was that the " information was out of time."

---

(1) [1914] P. 282.
(2) [1901] P. 60.
(3) [1914] P. 282, 285.
(4) [1912] 2 I. R. 44.
(5) [1913] 2 K. B. 479.
(6) [1942] 1 K. B. 193.
(7) [1916] W. N. 63; 85 L. J. (K. B.) 806.

It is argued, first of all, that it is impossible to discover from the very full report of *R.* (*McDonnell*) v. *Justices for Tyrone* (4) what was the preliminary point on which it was suggested that the first summons had been withdrawn in that case. I admit that it is impossible to answer that question from the report, and the late Lord Chief Justice seems to have been in error in that respect. Secondly, it is suggested that the sentence which I have already read, in which Lord Caldecote C.J. said that when a withdrawal of a summons is permitted by justices not on the merits of the case but on a preliminary point the withdrawal is not equivalent to a dismissal or an acquittal, it follows that, if the withdrawal was not on a preliminary point, and was on the merits of the case, it is the equivalent of a dismissal or an acquittal. I do not think that that is the right inference to be drawn from that expression of Lord Caldecote C.J. In my opinion, it would place the matrimonial jurisdiction in a state of unwarranted isolation in the general system of law if one were to hold that for some reason peculiar to matrimonial cases a withdrawal, not leading to an adverse adjudication, but a mere withdrawal, whether on a preliminary point or on the merits of the case, operated in any sense as an estoppel per rem judicatam. In my opinion there is no warrant for that, and I do not think that we ought to feel ourselves bound by the decision in *Hopkins* v. *Hopkins* (1), based, as I think it is, on a misapprehension of what was really said by the court in *Pickavance* v. *Pickavance* (2), to come to any such conclusion.

---

(1) [1913] 2 K. B. 479.
(2) [1942] 1 K. B. 193.
(3) Ibid. 197.
(4) [1912] 2 I. R. 44.
(5) [1913] 2 K. B. 479, 486.
(6) [1942] 1 K. B. 193, 198.
(7) [1901] P. 60.

In my opinion, therefore, the justices had jurisdiction to deal with the summons which was before them on March 29, 1949, for as I have already indicated, the matter of complaint being a continuous desertion, no question of time-limit in respect of the making of the complaint arose. But I feel bound to say that I do not think, having regard to the non-disclosure of the earlier proceedings, and, in particular, of that element in the evidence in the previous proceedings which related to the suggested reconciliation, that this order can stand. In my opinion the proper order is that the appeal should be allowed, and the wife's summons remitted for rehearing by a fresh panel of the Manchester City justices, it being plainly understood, however, that in determining the matter we are not expressing any opinion on the merits, and that the justices are completely unfettered by either of the two previous hearings in coming to a just decision on the facts as a whole.

BARNARD J. I entirely agree with what my Lord has said as to the true interpretation to be put upon the judgment of this court in the case of *Pickavance* v. *Pickavance* (2). My Lord has dealt with the misconception of that judgment in later cases, and I do not think that it is necessary for me to add anything to what he has said.

This court has, however, stated from time to time that

(1) [1914] P. 282.

(2) [1901] P. 60.

the principles which are applicable to the Divorce Division should be applied by justices when exercising their matrimonial jurisdiction. Therefore it is not unimportant to consider how the Divorce Division dealt with the dismissal of a petition other than when the subject-matter of the petition was adjudicated upon. I intend only to refer to one case. It is that of *Hall* v. *Hall and Richardson* (1). In that case the husband petitioner filed a petition for dissolution of marriage in May, 1873. In July, 1874, the petition was dismissed before hearing, on the petitioner's application, and with the consent of the respondent and the co-respondent. In October, 1878, the petitioner filed a fresh petition, which included the charges of adultery against the respondent and the co-respondent contained in the first petition, and it was held that he was not precluded by the dismissal of the first petition from repeating those charges. Sir James Hannen P. said at the commencement of his judgment: "I am of opinion that the answer "which has been proposed to be set up to this petition is "bad in law. It amounts to a plea of res judicata, that is to "say, the respondent alleges that the question of her guilt "has been determined by a judgment of this court in her "favour. I am of opinion that neither in fact nor in form "has there been any such adjudication." That case was referred to with approval by the Court of Appeal in *Goldblum* v. *Goldblum* (2).

In the present case, clearly, there was no adjudication. The summons was withdrawn. There is no evidence to suggest that the matter of the complaint, which in this case was desertion, was ever withdrawn, and there being no adjudication upon that, I agree entirely with what my Lord has said, that the justices had jurisdiction to deal with the matter. But for other reasons which my Lord has given this appeal must be allowed, and the case must go back to the justices for a rehearing.

Solicitors: *Jaques & Co. for Samuel Bieber and Bieber, Manchester; Field, Roscoe & Co. for Frank Leigh and Johnson, Manchester.*

(1) (1879) 48 L. J. (P.) 57. (2) [1939] P. 107.

J. B. G.

C. A.

1949

Apr. 29 ; *May* 23.

Bucknill, Somervell and Cohen L.JJ.

CASEY *v.* CASEY.

Nullity—Jurisdiction—Ground of petition, wilful refusal to consummate —Husband's domicile and residence, Canadian—Wife's pre-marriage domicile and residence, English—Marriage in England—Husband resident in Canada when petition brought.

The mere fact that the ceremony of marriage took place in England does not of itself give the court jurisdiction to entertain a suit for nullity of marriage, where the marriage is alleged not to be void ab initio, but voidable, e.g., on the ground of wilful refusal by the respondent to consummate it.

Where a woman domiciled and ordinarily resident in England, has married, in England, a man domiciled and ordinarily resident in Canada, the court in England has no jurisdiction to try a petition by the wife for nullity of marriage, on the ground of wilful refusal by the husband to consummate the marriage—the case of a voidable marriage—at all events, when at the time when the suit is brought, although the petitioning wife is resident in England, her husband is abroad—resident in the country of his domicile, Canada.

The issue whether such a marriage is voidable must be decided according to Canadian law, since the fact that the marriage took place in England, whilst the husband was on active service, does not raise an inference that the parties intended to make England their permanent matrimonial domicile.

De Reneville v. *De Reneville* [1948] P. 100, followed.

Per Bucknill L.J.: This decision is based partly on the balance of hardship to the parties, but mainly on the analogy of the rule that the court of the domicile of the husband is the sole court with jurisdiction to dissolve a valid marriage. It was reasonable that a similar rule, in principle, should be applied to a marriage which was merely voidable, on the ground of wilful refusal to consummate it.

Per Curiam: The decision as to jurisdiction on similar facts, but where both parties to the marriage were ordinarily resident in England at the time when the petition was filed might be to the contrary: that point should be left open.

Per Somervell L.J.: There were reasons of convenience for giving the court jurisdiction in such a case.

Inverclyde v. *Inverclyde* [1931] P. 29, to that extent, approved.

Observation of Sir Gorell Barnes P. in *Ogden* v. *Ogden* [1908] P. 46 at p. 80, disapproved.

APPEAL from a decision of his Honour Judge Earengey, sitting as a commissioner in divorce, dismissing a petition for nullity of marriage.

The parties married on February 27, 1943. The husband was then a member of the Canadian Forces in England, but his domicile and ordinary residence were Canadian. The wife at the date of the marriage was domiciled and ordinarily resident in England. The spouses slept together on the night of the marriage and the husband spent seven days' leave with his wife a few weeks later, but on neither occasion did the husband make any attempt to consummate the marriage. Apart from two hours in April, 1945, the wife did not see her husband again before his return to Canada in June, 1945. The wife rejoined her husband in Canada in May, 1946. She found his manner cool and reserved and, shortly afterwards, he admitted that he was no longer in love with her and said that in those circumstances it would be wrong for intercourse to take place. After two and a half months together, and after he had said he had ceased to love her and that this was final, the wife, with his approval, or at least without any dissent on his part, returned to England and subsequently presented a petition for nullity in England on the ground that her marriage had not been consummated owing to wilful refusal on the part of her husband. It was admitted in the petition that at the time when it was filed, both the husband and the wife were domiciled in Canada. The husband did not enter an appearance and took no part in the proceedings.

At the hearing his Honour Judge Earengey, sitting as a commissioner in divorce, found that the husband had wilfully refused to consummate the marriage, but that, the case being governed by *De Reneville* v. *De Reneville* (1) he had no jurisdiction to pronounce a decree of nullity. Accordingly he dismissed the petition.

The wife appealed.

F. K. Glazebrook for the wife. In *De Reneville* v. *De Reneville* (1) the marriage of the parties was in Paris and so that case does not govern this. The fact that the marriage between the parties in this case was in England gave the court jurisdiction in this nullity suit. In the following cases of petitions for nullity, where the respondent was domiciled and resident abroad the court held that there was jurisdiction: *Simonin* v. *Mallac* (2). In that case it was held that the husband having entered into a contract in this country was subject to the jurisdiction of the courts of this country. (That remains law, but this case has been overruled on the second proposition in the head-note); *Cooper* v. *Crane* (3) (In this case the respondent was an American but no point appears to have been taken about his domicile) ; *Linke* v. *Van Aerde* (1). See also *Mitford* v. *Mitford* (2).

---

(1) [1948] P. 100.
(2) (1860) 2 Sw. & Tr. 67.
(3) [1891] P. 369.

In *Ogden* v. *Ogden* (3) Sir Gorell Barnes P. said (4) : " It has " frequently been held that, although the courts of the domicile " of the parties might entertain the question of the validity " of their marriage, yet that the courts of the country in which " the marriage was celebrated will also entertain a suit to " determine the same question : see *Linke* v. *Van Aerde* (1). " It may possibly be that if a suit were brought for nullity " on the ground of impotence and the facts were established " in favour of the petitioner, either in the court of the domicile " of the parties or in the court of the country in which the " marriage was celebrated, it might be reasonable to hold " that such a decree ought to be treated as universally binding." If that observation of the President is right, the court in this case had jurisdiction to try this case of nullity on the ground of wilful refusal to consummate. Bateson J. however, in *Inverclyde* v. *Inverclyde* (5) did not take the view of Sir Gorell Barnes P., expressed in *Ogden* v. *Ogden* (3), holding (against my contention) that " a decree annulling a marriage " on the ground of impotence is a judgment in rem, altering " the status of the parties and can be pronounced only by the " court of their domicile. A decree annulling a marriage on " this ground deals with a marriage which till the date of the " decree was voidable only and not void. In substance, it is " a decree for the dissolution of that marriage, and is thus " distinguished from decrees annulling marriages for illegality " or informality." Bateson J. appears to rest his decision on an observation of Lord Phillimore in *Salvesen* v. *Administrator of Austrian Property* (6). It is submitted that the decision of Bateson J. is wrong and should not be followed. It has, in fact, not been followed by a number of divorce judges. See the decision of Pilcher J. in *Hutter* v. *Hutter* (7). Where an Englishwoman petitioned for nullity on the ground of duress and her de facto husband was domiciled in Egypt, the court exercised jurisdiction :—*Hussein otherwise Blitz* v. *Hussein* (8) (the *Inverclyde* case (5) was not there cited).

---

(1) (1894) 10 T. L. R. 426.
(2) [1923] P. 130.
(3) [1908] P. 46.
(4) Ibid. 80.
(5) [1931] P. 29, 44.
(6) [1927] A. C. 641, 671.
(7) [1944] P. 95.
(8) [1938] P. 159.

In *De Massa* v. *De Massa* (1) and *Galene* v. *Galene* (2) in each case, a young woman domiciled in France, petitioned for nullity. In each case the court exercised jurisdiction, the ceremony having been performed in England and there having already been an annulment of the marriage in France by a court of competent jurisdiction. In *Easterbrook* v. *Easterbrook* (3) the petition was for nullity, the ground being wilful refusal to consummate the marriage. The petitioner, the husband, was domiciled in Canada and the petition alleged that the wife was domiciled in England. The marriage ceremony took place in England. The respondent did not appear and made no protest to the jurisdiction. The court refused to follow the *Inverclyde* case (4), where the distinction was made between voidable and void marriages and granted a decree. Lord Greene M.R. said in *De Reneville* v. *De Reneville* (5): "It is not necessary to decide in the present "case the question whether the court will exercise jurisdiction "over voidable marriages where both parties have merely "a permanent residence within the jurisdiction, or where "the marriage has taken place within the jurisdiction." The question, therefore, now before the court was expressly left open. The issue, therefore, is whether *Simonin's* case (6) and the obiter dictum of Sir Gorell Barnes P. in *Ogden* v. *Ogden* (7) and the other cases cited establish that, on the facts of this case, the court has jurisdiction.

See Dicey's Conflict of Laws (6th edit.) at p. 244: "Rule 35— "The court has jurisdiction to entertain a suit for a "declaration of nullity of marriage . . . . (3.) where the "marriage was celebrated in England . . . ." Then in a note: "But for contrary view where marriage is "voidable see *Inverclyde* v. *Inverclyde* (4)." In Cheshire's Private International Law (3rd edit.) at p. 448 is the following passage: "Despite Lord Phillimore's dictum "in the *Salvesen* case (8) that nullity jurisdiction depends "solely upon domicile, it is well established by a series of "decisions dating back to 1860, that the English court is "competent to annul a marriage that was solemnized in "England. The jurisdiction is undoubted in the case of

---

(1) [1939] 2 All E. R. 150*n*.
(2) [1939] 2 All E. R. 148.
(3) [1944] P. 10.
(4) [1931] P. 29.
(5) [1948] P. 100, 123.
(6) 2 Sw. & Tr. 67.
(7) [1908] P. 46, 80.
(8) [1927] A. C. 641, 671.

"a void marriage, but whether it exists in the case of a voidable marriage, cannot be affirmed with complete assurance." See also Rayden on Divorce (5th edit.) at p. 31, s. 29: "The court has jurisdiction to entertain a suit for nullity where the marriage was celebrated in England, at any rate where the marriage was void ab initio; and, probably also, where it is voidable only."

The respondent husband was not represented.

Cur. adv. vult.

May 23. Bucknill L.J. This is an appeal from the judgment of his Honour Judge Earengey, sitting as a commissioner in divorce, whereby he dismissed the petition of the wife for a decree of nullity, based on the ground that her marriage had not been consummated owing to the wilful refusal of her husband. The commissioner found that the husband had wilfully refused to consummate the marriage, but dismissed the petition because he held that the court had no jurisdiction to grant a decree of nullity. The ground of his decision was that the case was governed by *De Reneville* v. *De Reneville* (1), a decision of the Court of Appeal. In that case an Englishwoman, domiciled and resident in England, was married in Paris to a Frenchman domiciled and resident in France, and thereafter lived with him in France. She subsequently returned to England and petitioned for a decree of nullity on the ground of impotence or wilful refusal to consummate the marriage. The Court of Appeal held that: (A) By English law a marriage is voidable and not void on the ground of impotence or wilful refusal to consummate it. If voidable, the marriage is and must be regarded as having had the effect of giving to the petitioner, as a matter of law, the French domicile of her husband and as precluding her from casting off that domicile before a decree of annulment is actually pronounced and (B) the question whether the marriage was void or merely voidable was for French law to answer. Lord Greene M.R. said that (2) "The validity of a marriage so far as regards the observance of formalities is a matter for the lex loci celebrationis. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion, by the law of France, either

---

(1) [1948] P. 100.

(2) Ibid. 114.

C. A.
1949
Casey
v.
Casey.
Bucknill L.J.

"because that is the law of the husband's domicile at the "date of the marriage, or (preferably, in my view) because "at that date it was the law of the matrimonial domicile "in reference to which the parties may have been supposed "to enter into the bonds of marriage." The case of *De Reneville* (1) also decided that (C) the English court had no jurisdiction to grant a decree of nullity on the ground of impotence or wilful refusal solely on the ground of the wife's residence in England before and at the time of the institution of the suit.

The only material difference between the facts in that case and the one before the court is that in *De Reneville's* case (1) the celebration of marriage took place in Paris. Mr. Glazebrook for the wife petitioner argued that the fact that the marriage was in England gives the court jurisdiction in this case. He relied in support of his argument on reported cases where the court decided as to the validity of a marriage celebrated in this country, although the respondent husband was resident and domciled abroad when the suit was instituted. Thus in *Simonin* v. *Mallac* (2), the material facts were that a man and woman, both domiciled and resident in France, came over to England for the purpose of being married here. They went through a regular form of marriage in church on June 21, 1854, and two days later returned to Paris. The marriage contravened the law of France regulating the marriage of native-domiciled French subjects contracted in foreign countries. The husband refused to consummate the marriage, and on December 1, 1854, on the petition of the wife the appropriate court in France declared the marriage null and of no legal effect. About four years later, the wife, who was then residing and domiciled in England, applied to the Divorce court for a decree of nullity of her marriage. The court dismissed the petition on the ground that the validity of the contract of marriage depended on the law of England as prevailing among English subjects. The decision in that case merely dealt with the question whether the court had jurisdiction to decide as to the validity of a contract of marriage made in England. As Lord Haldane said in *Salvesen* v. *Administrator of Austrian Property* (3), with reference to the case of *Simonin* v. *Mallac* (2): "Sir Creswell Creswell held that as her marriage had been "solemnized in England, the parties had contracted with

---

(1) [1948] P. 100.
(2) 2 Sw. & Tr. 67.
(3) [1927] A. C. 641, 659.

C. A.

1949

Casey
v.
Casey.

Bucknill L.J.

"reference to the law of this country as to validity." But in this case before us no question arises as to the validity of the contract of marriage so far as forms are concerned. The only question is whether the court has jurisdiction to annul this marriage which, by English law, is not void ab initio but voidable, and therefore valid, until the decree avoiding it is declared.

In *Sottomayor* v. *De Barros* (1), the petitioner and respondent were first cousins and Portuguese subjects domiciled in Portugal. They came to reside in England in 1858, and in 1866 went through a regular form of marriage in London. They returned to Portugal in 1873: their domicile throughout was Portuguese. By the law of Portugal a marriage between first cousins was incestuous and illegal. In 1874 the petitioner filed a petition praying the court to declare the marriage to be null and void. Sir Robert Phillimore, who heard the case, dismissed the petition because he felt himself bound by the decision in *Simonin* v. *Mallac* (2). The Court of Appeal reversed this decision and, in the course of his judgment, Cotton L.J., who gave the judgment of the court, said (3): "the law of a country where a marriage is solemnized must "alone decide all questions relating to the validity of the "ceremony by which the marriage is alleged to have been "constituted; but, as in other contracts, so in that of marriage, "personal capacity must depend on the law of domicile." At the conclusion of the judgment, Cotton L.J. said (4): "It "only remains to consider the case of *Simonin* v. *Mallac* (2). "The objection to the validity of the marriage in that case, "which was solemnized in England, was the want of the "consent of the parents required by the law of France, but "not under the circumstances by that of this country. In "our opinion, this consent must be considered a part of the "ceremony of marriage, and not a matter affecting the personal "capacity of the parties to contract marriage; and the "decision in *Simonin* v. *Mallac* (2) does not, we think, govern "the present case." I understand that the court was prepared to annul the marriage in *Sottomayor* v. *De Barros* (1), not because the marriage was celebrated in England, but because the domicile and residence of both parties in Portugal regulated their capacity to contract a valid marriage. "It is proved," said Cotton L.J., in his judgment (5), "that

---

(1) (1877) 2 P. D. 81; 3 P. D. 1.

(2) 2 Sw. & Tr. 67.

(3) 3 P. D. 1, 5.

(4) Ibid. 7.

(5) Ibid. 6.

"the courts of Portugal where the petitioner and respondent "are domiciled and resident, would hold the marriage void, "as solemnized between parties incapable of marrying and "incestuous. How can the courts of this country hold the "contrary and, if appealed to, say the marriage is valid ?" The essential difference, however, between the case of *Sottomayor* v. *De Barros* (1) and the present case is that the marriage in the present case was valid in all respects, so far as form and capacity were concerned. It is merely voidable because of the wilful refusal of the husband to consummate it.

Two other cases to which Mr. Glazebrook referred were *Galene* v. *Galene* (2), and *De Massa* v. *De Massa* (3).

In *Galene's* case, Henn Collins J. followed the decision of Lord Merrivale P. in *De Massa* v. *De Massa* (3) in 1931. The facts in that case were that the petitioner, a Frenchwoman and a minor, went through a form of marriage in London in July, 1927, with a Frenchman. They subsequently lived together in London for three weeks and the petitioner then returned to France and had not seen the respondent since. Three years later, a decree of the French Court was obtained annulling the English marriage on the ground that the father of the wife had not given his consent to the marriage as required by French law. When the wife subsequently petitioned for a decree of nullity in the Divorce Court, Lord Merrivale P., in his judgment pointed out that the domicile was French and that it was necessarily a matter for a French tribunal. He then said (3) : "A French tribunal of competent jurisdiction "has annulled the marriage, and that declaration of nullity "has come into operation. All that it is necessary for me "to do now, the facts being in due order, is to declare the "marriage to have been null and void, citing the judgment "of the French tribunal as a judgment between the parties."

Some support for the argument for the wife in the present case may be found in the judgment of Sir Gorell Barnes P., in *Ogden* v. *Ogden* (4), where he said (5) : "It has frequently "been held that although the courts of the domicile of the "parties might entertain the question of the validity of their "marriage, yet that the courts of the country in which the

(1) 3 P. D. 1.
(2) [1939] 2 All E. R. 148.
(3) (1931) reported [1939] 2 All E. R. 150*n*.
(4) [1908] P. 46.
(5) Ibid. 80.

"marriage was celebrated will also entertain a suit to determine the same question: see *Linke* v. *Van Aerde* (1). It "may possibly be that if a suit were brought for nullity on the "ground of impotence, and the facts were established in "favour of the petitioner, either in the court of the domicile "of the parties or in the court of the country in which the "marriage was celebrated, it might be reasonable to hold that "such a decree ought to be treated as universally binding . . . ." In *Linke* v. *Van Aerde* (1), the wife petitioned for a decree of nullity of her marriage on the ground that the respondent was at the time of the marriage a married man. Both husband and wife were foreign, but the marriage was celebrated in England. Gorell Barnes J., in his judgment, said that the marriage contract was entered into here, that the principles of dissolution of marriage did not apply to nullity suits, and that in these suits the validity of the ceremony was to be determined according to the law of the place in which it was celebrated—"The jurisdiction of this court to deal with "the question of the validity of the marriage of the parties to "the present suit was therefore clear."

The law, however, draws a distinction between nullity cases based on bigamy, and nullity cases based on impotence or wilful refusal to consummate, as was pointed out in the judgment of Lord Greene M.R., in *De Reneville* v. *De Reneville* (2). The suggestion of Sir Gorell Barnes P. in *Ogden* v. *Ogden* was not accepted by Bateson J., in *Inverclyde* v. *Inverclyde* (3). In that case Bateson J., held that the court had no jurisdiction to grant a decree of nullity on the ground of impotence in a case where the marriage took place in London, but both husband and wife were domiciled in Scotland.

I find therefore no clear decision on the point as to the jurisdiction in nullity cases on the ground of wilful refusal to consummate it, where the marriage has been celebrated in England, but the respondent husband is domiciled and resident abroad. It is well established that in a case where the petition is for the dissolution of a marriage the court has no jurisdiction to grant a decree on the ground that the marriage took place in England, if the domicile of the husband, and therefore of the wife, is abroad at the time of the institution of the suit. Such jurisdiction is based exclusively on domicile as decided by the Privy Council in *le Mesurier* v. *le Mesurier* (4), and approved by the House of Lords in *Salvesen's* case (1). Why, then, should there be a distinction, on the ground of the place of celebration of marriage, between a petition for dissolution of a valid marriage and a petition to annul a marriage on the ground of wilful refusal to consummate it? I can see no good reason for such a distinction. It is not necessary in this case to decide whether there is a difference between the jurisdiction to dissolve and the jurisdiction to annul, in that the residence of both parties in England at the time of the institution of the nullity suit may be sufficient to establish jurisdiction, although such residence is insufficient in the case of a valid marriage which is not voidable but dissoluble. That question is undecided, but I see no sufficient reason why the law should declare that the celebration of marriage in England may in itself found jurisdiction in a suit based on wilful refusal to consummate, although it does not do so in a suit for dissolution of marriage. There may be considerable hardship to the petitioner in refusing jurisdiction where both parties are resident within the jurisdiction, although domiciled abroad at the time when the suit is instituted, but there is not the same hardship to the petitioner in refusing jurisdiction in a case where the ceremony of marriage took place in England but the respondent is resident and domiciled abroad. In this case it may be hard on the petitioner to require her to take proceedings in Canada to obtain a decree of nullity. It is also hard on the respondent to require him to defend the suit in England. I think that inasmuch as the wife could have started proceedings in Canada for a decree of nullity when she was there, but elected to leave Canada and return to England, the scales of hardship tip in favour of the husband rather than of the wife, so far as the venue is concerned. I may here quote the words of Lord Greene M.R. in *De Reneville's* case (2): "That a wife who is resident but, ex hypothesi, not domiciled "here can compel her husband who is both domiciled and "resident abroad to come to this country and submit the "question of his status to the courts of this country appears "to me to be contrary both to principle and to convenience."

---

(1) 10 T. L. R. 426.
(2) [1948] P. 100.
(3) [1931] P. 29.
(4) [1895] A. C. 517.

A further point arises, viz.: should the question whether this marriage is void or voidable be decided by English law or Canadian law? The passage in Lord Greene's judgment in *De Reneville* v. *De Reneville* (3) which I have already cited, indicates that the law applicable is the law of Canada, because the husband is domiciled in Canada, and because at the date of the marriage it was the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage. I do not think that the fact that the marriage took place in England, while the husband was on active service raises an inference that the parties intended to make England their permanent matrimonial domicile. Apart from evidence to the contrary, one assumes that the law of Canada on the question of voidability of marriages is the same as English law, as stated in *De Reneville* v. *De Reneville* (1). No evidence as to the appropriate Canadian law on the subject was produced before the trial judge or before the Court of Appeal. The note on p. 449 of the 3rd edit. of Professor Cheshire's work on Private International Law refers to two cases in Canada, in which the court held that it had jurisdiction to annul a marriage by reason of the impotence of a respondent, resident and domiciled abroad, provided the marriage was celebrated within the jurisdiction. The first case is *G.* v. *G.* (2), decided by the Court of King's Bench for the province of Saskatchewan in 1928. Macdonald J. held that the court had jurisdiction to grant a decree of nullity of a marriage entered into in Saskatchewan on the ground of the impotence of the wife, although the husband plaintiff was domiciled and resident in Alberta, and the wife was residing in Manitoba at the time of the commencement of the action. The learned judge founded his judgment, inter alia, on the decisions in the following cases: *Brook* v. *Brook* (3), *Ogden* v. *Ogden* (4), *Linke* v. *Van Aerde* (5), and *Sottomayor* v. *De Barros* (6). The other case is *Reid* v. *Francis* (7) decided by the Saskatchewan Court of Appeal in 1929. In that case the marriage took place in the City of Saskatoon, and the parties lived there four years after the marriage. The defendant husband then left the province and went to live in California, where he was served with the writ of summons. The judgment of Martin J., who delivered the judgment of the court, dealt with the question of jurisdiction as follows: "I do not consider it "necessary to determine whether or not the defendant husband "was domiciled in Saskatchewan at the time of the issue

---

(1) [1927] A. C. 641, 654, 665 and 666.

(2) [1948] P. 100, 118.

(3) Ibid. 114.

---

(1) [1948] P. 100, 118.
(2) (1928) 22 Sask. L. R. 376.
(3) (1861) 9 H. L. C. 193.
(4) [1908] P. 46.
(5) 10 T. L. R. 426.
(6) 3 P. D. 1.
(7) (1929) 4 D. L. R. 311.

" of the writ (although I am of the opinion that so far as " appears in the evidence he was), because the Court of King's " Bench has jurisdiction to entertain a suit for a declaration " of nullity of an existing marriage when the marriage was " celebrated in Saskatchewan." In addition to some of the cases referred to in the previous report of *G.* v. *G.* (1), *Simonin* v. *Mallac* (2), *Niboyet* v. *Niboyet* (3) (overruled by the House of Lords in *Salvesen* v. *Administrator of Austrian Property* (4)), and *Mitford* v. *Mitford* (5), were referred to. Both these Canadian cases were decided before the English decisions in *Inverclyde* (6) and *De Reneville* (7). The cases cited in the Canadian judgments tend to show, in my respectful opinion, that the Canadian courts at that time regarded a nullity suit on the ground of impotence as one in which the marriage was void ab initio.

It may be argued that these cases show that by Canadian law, at any rate, in 1929, a marriage was void and not merely voidable on the ground of impotence, and therefore that the wife in this case had not by Canadian law acquired her husband's domicile, and therefore that she, being domiciled and resident in England, was entitled to ask for a declaration of nullity in the English Divorce Court. See *White* v. *White* (8) approved in *De Reneville's* case (7). But I am not satisfied from these decisions that the Canadian law in 1948, so far as nullity proceedings for wilful refusal to consummate are concerned, would not be the same as the decision of the Court of Appeal in *De Reneville's* case (7). This point as to Canadian law was not argued before us.

My opinion in favour of dismissing this appeal is based, partly on the balance of hardship to the parties, but mainly on the analogy of the rule that the court of the domicile of the husband is the sole court with jurisdiction to dissolve a valid marriage. It seems to me reasonable that a similar rule should be applied in principle to a marriage which is merely voidable on the ground of wilful refusal to consummate it. There may be an exception to the rule in the case of a voidable marriage where both parties are resident in the

---

(1) (1928) 22 Sask. L. R. 376.
(2) 2 Sw. & Tr. 67.
(3) (1878) 4 P. D. 1.
(4) [1927] A. C. 641.
(5) [1923] P. 130.
(6) [1931] P. 29.
(7) [1948] P. 100.
(8) [1937] P. 111.

C. A.

1949

CASEY
v.
CASEY.

country where the petition is filed, but I do not see the necessity of making an exception on the ground that the marriage has been celebrated in the country where jurisdiction is invoked. I think that the appeal should be dismissed.

SOMERVELL L.J. (his judgment was read by COHEN L.J.): The issue that we have to decide has been stated by Bucknill L.J., and it is unnecessary to reformulate it or to set out the facts. In *Inverclyde* v. *Inverclyde*, (1) Bateson J., based his decision on the principle that suits for nullity in which the marriage is voidable, being similar to suits for dissolution, the only court that has jurisdiction is that of the domicile. It is clear from the judgment in *De Reneville* v. *De Reneville* (2), that this court did not accept that principle. If that had been the basis, the cases in which jurisdiction had been exercised where both parties were resident, though not domiciled, were plainly wrong. Lord Greene M.R., however, expressly refrained from coming to any conclusion on that point (3). We were referred to a number of cases in which the suit for nullity was based on the alleged invalidity of the ceremony. Jurisdiction has in such cases been exercised although the parties were not domiciled here, but the ceremony was performed here. See *Cooper* v. *Crane* (4), and *Hussein otherwise Blitz* v. *Hussein* (5). In the present case, however, it is not suggested that the ceremony was invalid. It is clear from *Salvesen* v. *Administrator of Austrian Property* (6), that the courts of the country in which the parties are domiciled have jurisdiction to annul a marriage on the ground that the ceremony of marriage was invalid though performed in another country. Lord Phillimore expressed the opinion that the courts of the country of domicile had exclusive jurisdiction (7). This was obiter and has not been followed in, for example, *Hussein's* case (5).

In *Simonin* v. *Mallac* (8), the parties being domiciled in France went through a ceremony of marriage in England, returning thereafter to France. The man obtained a decree of nullity in France owing to the non-observance of conditions precedent required by French law. The woman subsequently came to reside here and petitioned for a decree

(1) [1931] P. 29.
(2) [1948] P. 100.
(3) Ibid. 118.
(4) [1891] P. 369.
(5) [1938] P. 159.
(6) [1927] A. C. 641.
(7) Ibid. 671.
(8) 2 Sw. & Tr. 67.

of nullity. Her petition was refused. It seems clear that today the court would, in the absence of fraud or collusion which was not suggested, have accepted the decree of the French court as settling the status of the parties. This does not mean that the court would not have had jurisdiction to entertain the petition. In *De Massa* v. *De Massa* (1), followed in *Galene* v. *Galene* (2), a decree was pronounced here, the ceremony having been performed here, following on and by way of enforcing decrees previously pronounced by the courts of the domicile. In both these cases the petitions were based on the invalidity of the ceremony.

In my opinion, these cases do not cover the present issue. It may well be convenient that the courts of the country, where a ceremony of marriage has been performed, should have jurisdiction to entertain suits where the validity of that ceremony is in issue. Where, however, the ceremony is not attacked, a different issue arises and there seems to me no ground in principle for giving jurisdiction to the courts of the country of the ceremony. The present case illustrates the inconvenience. The respondent husband, whose status is affected, is domiciled and resident in Canada and the events mainly relied on in support of the petition took place in Canada. *De Reneville* v. *De Reneville* (3) decided that in the case of a voidable marriage the fact that the petitioner was, previous to the marriage, domiciled here is not a ground on which jurisdiction can be founded. The mere fact that the ceremony of marriage took place in a country does not seem to me a ground for founding jurisdiction in cases where the matters alleged in the petition do not in any way dispute the validity of the ceremony as effecting a marriage.

With regard to *Inverclyde* v. *Inverclyde* (4), Pilcher J., in *Hutter* v. *Hutter* (5), refused to follow that case, where both parties were resident in England at the time of the institution of the suit. That point does not arise here. No doubt there is force in the argument that nullity suits where the marriage is voidable are similar to suits for dissolution. On the other hand, there seem to me to be considerable reasons of convenience for giving the courts where the respondent or both parties reside jurisdiction in this class of case, and I would desire, so far as this court is concerned, to keep that point open until it arises.

(1) [1939] 2 All E. R. 150*n*.
(2) [1939] 2 All E. R. 148.
(3) [1948] P. 100.
(4) [1931] P. 28.
(5) [1944] P. 95.

C. A.
1949
Casey
v.
Casey.

Cohen L.J. I have written a judgment in this case, but I have since had an opportunity of reading the judgment which has been delivered by Bucknill L.J., and I find myself in such complete agreement with it that I will not take up time by giving reasons of my own for agreeing that this appeal fails.

Appeal dismissed.

Solicitor for the wife: *Sidney Samson.*

C. G. M.

1949
May 25.
Pearce J.

IN THE ESTATE OF CHARLES GIBSON, Decd.

Probate—Will—Attestation—Totally blind witness—Want of due execution—Wills Act, 1837 (1 *Vict., c.* 26), *s.* 9.

A blind person is incapable of being a witness to a will.

Hudson v. *Parker* (1844) 1 Rob. Ecc. 14 and *Re Goods of Gunstan: Blake* v. *Blake* (1882) 7 P. D. 102 applied.

Probate Motion.

The court was moved for a grant of probate of the will of the deceased as contained in a copy reconstructed from memory (the original will had been lost) together with two codicils thereto. The will was duly executed in 1925 and the first codicil in 1935. In 1943 the deceased signed the second codicil, the alleged attestation of which is the subject of this report.

The second codicil was signed by the deceased in the presence of one Fred Edward James, then managing clerk to a firm of solicitors, and of his wife. Mr. James was totally blind as a result of an accident which he had suffered in 1942; but he had known the deceased personally since 1932, and he knew him quite well by his voice.

The question was raised whether the second codicil had been duly executed in view of the total blindness of this witness (1).

---

(1) By s. 9 of the Wills Act, 1837:—"no will shall be valid "unless . . . . it shall be signed "by the testator . . . . and such "signature shall be made or "acknowledged by the testator "in the presence of two or more "witnesses, present at the same "time, and such witnesses shall "attest and shall subscribe the "will in the presence of the "testator . . . ."

Percy Hollins for the applicant.

T. K. Wigan for the beneficiary under the second codicil: The evidence is that the testator and the two witnesses were sitting close together and that the testator was actually touching the blind man. Notwithstanding his blindness, Mr. James knew of his own knowledge of the man that he was next to Mr. Gibson, and he was aware that Mr. Gibson was signing a codicil. But for his blindness he would have seen him do so. The court is not interested in such a case in the narrow question, "Could the witness see?"; for as Sir Herbert Jenner Fust pointed out in *Newton and Thomas* v. *Clarke* (1) "the object of the Act is to prevent the substitution "of another paper, and that no fraud should be practised on "the deceased." For this purpose it is more important (as would appear to be recognized in *Tribe* v. *Tribe* (2)) that the testator should see the witnesses sign, and thus ensure that the document which they sign is in fact the document which he intends to put out as his will, than that the witnesses should see the testator sign.

There is no reported case of a blind witness, although there are cases of blind testators—e.g. *Re Piercy deceased* (3). Those cases which would appear to be against me, such as *Hudson* v. *Parker* (4) and *Re Goods of Gunstan*: *Blake* v. *Blake* (5), are acknowledgment cases; and it has never been expressly decided that when it is alleged that the testator has actually signed before two witnesses it is essential that the witnesses should have seen him sign. On the contrary, in *Newton and Thomas* v. *Clarke* (1) the testator was held to have signed his name in the presence of the witnesses although he was in bed with the curtains drawn; both witnesses and testator in that case were aware of what was being done; it is submitted that, although Dr. Lushington in *Hudson* v. *Parker* (4) appeared not to agree with Dr. Fust's judgment in *Newton and Thomas* v. *Clarke* (1), he had misunderstood the point of Dr. Fust's decision and was, moreover, adding a new requirement, namely "in the sight of," to the Statute.

[Pearce J. Unless it was considered that those words should be readily inferred and that it was not necessary specifically to include them in the statute.]

If there is any inconsistency between *Hudson* v. *Parker* (4) and *Newton and Thomas* v. *Clarke* (1) it is submitted that

---

(1) (1839) 2 Curt. 320, 323.

(2) (1849) 1 Rob. Ecc. 775.

(3) (1845) 1 Rob. Ecc. 278.

(4) (1844) 1 Rob. Ecc. 14.

(5) (1882) 7 P. D. 102.

1949

In the Estate of Charles Gibson, decd.

the judgment of Dr. Fust in the latter should be followed as a truer view of the objects and meaning of the statute.

(Counsel also referred to *Smith and Smith* v. *Smith* (1), *Carter* v. *Seaton* (2), *Wright* v. *Sanderson* (3), *Brown* v. *Skirrow* (4).)

Pearce J. In this case the argument for the validity of the codicil has been put forward with care and ability by Mr. Wigan.

The court is naturally loath to upset the wishes of a testator, but the requirements of the Wills Act, 1837, have to be complied with. I must decide whether this codicil was signed " in the presence of two or more witnesses present " at the same time," and whether such witnesses " attested " and subscribed " the codicil.

I am satisfied on the evidence of the female witness that two witnesses, a man and his wife, were in the room with the testator when the codicil was signed, and that both witnesses subscribed it. But the man was blind. He had been blinded eighteen months before, in his middle age. He was not then so clever, therefore, in his remaining faculties as people who have been born blind and who have had many years of affliction in which to train their other senses. His evidence was honest, but he admitted that he relied on presumptions in regard to several matters that happened. On his evidence alone, without that of his wife, I should feel no certainty whether the document had been signed by the testator and the other witness, nor would he be able to identify the document.

There is no direct authority on the capacity of a blind man to witness a will. The normal meaning of " attesting " is testifying or bearing witness to something, and the normal meaning of " witness " is one who is a spectator of an incident or one who is present at an incident. Is mere presence, without the faculty of sight, enough to constitute a witness for the purposes of s. 9 of the Wills Act, 1837? Is an act which the witness cannot see done in his presence? The object of the Act is clear. One witness is not enough. The presence of two witnesses is made necessary in order to give certainty and to avoid fraud. In the light of common sense, and without any authority, I should be inclined to hold that for the purposes of the Act, a " witness " means, in regard to

(1) (1866) L. R. 1 P. & M. 143.

(2) (1901) 17 T. L. R. 671, 672.

(3) (1884) 9 P. D. 149, 160.

(4) [1902] P. 3.

things audible, one who has the faculty of hearing, and in regard to things visible, one who has the faculty of seeing. The signing of a will is a visible matter. Therefore, I think that a will is not signed " in the presence of " a blind person, nor is a blind person a witness for the purposes of the section. If, in peculiar circumstances, a blind man can be a witness to the signature of a will, and it can be truly said to be signed in his presence, I do not think that the circumstances in this particular case are such as to comply with the section.

I am confirmed in this view by the dicta in various cases which Mr. Wigan has properly put before me. In *Hudson* v. *Parker* (1), Dr. Lushington was considering the question of acknowledgment, and he there said (2): " The words of " which we now wish to understand the meaning, are the " following—' such signature shall be made or acknowledged " ' by the testator in the presence of two or more witnesses " ' present at the same time.' The previous part of the clause " having required the signature to be affixed ' at the foot of " ' the will,' the section goes on—' and such witnesses shall " ' attest and shall subscribe the will in the presence of the " ' testator, but no form of attestation shall be necessary.' " First, then, as to the plain meaning of these words, ' that the " ' signature of the testator shall be made in the presence of " ' two witnesses,' will the statute be satisfied, if the signature " be made in their presence, if they are in ignorance of the " fact ? I am of opinion, under such circumstances, that the " statute is not complied with. It is obvious, that the solution " of this question must mainly depend on the meaning which " the legislature intended to convey by the use of the word " ' presence,' in this and in the other clauses of the statute. " What could possibly be the object of the legislature, except " that the witnesses should see and be conscious of the act " done, and be able to prove it by their own evidence: if the " witnesses are not to be mentally, as well as bodily, present, " they might be asleep, or intoxicated, or of unsound mind. " Again, how is the signature so made to be proved, except " by parol evidence ?—to exclude which was one great object " of the statute.

" In support of this view of the question, let us call to mind " how the word ' presence ' is received in its common acceptation :—loquendum est ut vulgus, says Lord Coke. If, " in the course of common conversation a person wishes to

---

(1) 1 Rob. Ecc. 14. (2) Ibid. 23.

"support the truth of a statement, does he not say—'such "'a one was present, and he will vouch for the truth'? "if a statement be questioned, does not a person say, 'I was "'present and can attest its correctness,' and does not the "whole world understand by this, mental, not bodily presence? "Would not a contrary construction lead to absurdity, and "defeat the plain intention of the statute?" Later in his judgment, Dr. Lushington used these words (1): "The "witnesses are to see the signature made or acknowledged, "because they are to attest it and to bear witness thereof"; and later, "but they cannot equally depose to the signature of the "testator being made or acknowledged in their presence, unless "they see the act." He also said (2): "They must see the "act done in order to attest it." And later (3) he quoted from a judgment in *Doe dem. Spilsbury* v. *Burdett* (4) of Patteson J., dealing with a signature to a power under the Statute of Frauds: "Now the fair meaning of the previous "words, 'in the presence of three or more credible witnesses' "must be, that three or more credible persons should see "what is done." Finally, in giving the reasons why he held that in that particular case there had been no proper execution he said (5): "Lastly: because the witnesses never saw, or "indeed could see the signature, of which there was no acknowledgment unless constructive."

In his observations in that case, Dr. Lushington emphasized throughout the necessity for seeing. That case was followed in *In re Goods of Mary Gunstan*: *Blake* v. *Blake* (6), where Jessel M.R., said (7): "The question, then, arises whether "the testatrix acknowledged her signature before the witnesses. "What is in law sufficient acknowledgment under the statute? "What I take to be the law is correctly laid down in Jarman "on Wills, 4th ed., p. 108, in the following terms: 'There is "'no sufficient acknowledgement unless the witnesses either "'saw or might have seen the signature, not even though "'the testator should expressly declare that the paper to be "'attested by them is his will'; and I may add, in my "opinion, it is not sufficient even if the testator were to say, "'My signature is inside the paper,' unless the witnesses were "able to see the signature. There is a great deal of authority

---

(1) 1 Rob. Ecc. 35.
(2) Ibid. 36.
(3) Ibid. 37.
(4) (1842–3) 10 Cl. & Fin. 340, 394.
(5) 1 Rob. Ecc. 14, 40.
(6) 7 P. D. 102.
(7) Ibid. 107.

" on this point, several cases are referred to in the note to " the passage which I have read, but I think it is sufficient " to mention three cases only. The first is *Hudson* v. *Parker* " (1), where the matter is most elaborately discussed by " Dr. Lushington. He tells us what in his view is the plain " meaning of acknowledging a signature in the presence of " witnesses; he says (2): 'What do the words import but " 'this? Here is my name written, I acknowledge that name " 'so written to have been written by me; bear witness.' " How is it possible that the witnesses should swear that any " signature was acknowledged unless they saw it?"

Brett L.J. said (3): " When you find that in order to make " the signature sufficient the witness must see the person sign, " so when a signature is to be acknowledged they must see " that there is a signature, and the testator must then in their " presence say something equivalent to 'That is my signature'; " so that if they do not have the opportunity of seeing " the signature, even if he say before them, 'My signature is " 'in this instrument,' that will not do. That I take to be " the decision of *Hudson* v. *Parker* (1)."

Holker L.J. said (4): " It is clear that good sense requires " that the acknowledgment to which the witnesses are to " bear testimony should be an acknowledgment of the " signature seen or capable of being seen by the witnesses. " Although the words of the statute are, 'Such witnesses shall " attest the will' and not 'the signature,' it seems to me " that it comes to the same thing, for when the document is " properly signed or acknowledged in the presence of the " witnesses, it becomes a will. So to my mind, to bear testi" mony to a will is the same thing as to bear testimony to the " signature."

The Lord Justices all appear in my opinion to attach importance to the fact of a signature being seen. It is argued by Mr. Wigan that those are cases of acknowledgment of a signature, and that they differ from cases of a signing of a signature; but I see no logical reason to distinguish between those two things. Mr. Wigan also relies on *Newton and Thomas* v. *Clarke* (5), but that case has not a direct bearing on this point and, like the cases which I have cited, it is useful only by inference. It is clear from *Hudson* v. *Parker* (1) that Dr.

(1) 1 Rob. Ecc. 14.
(2) Ibid. 25.
(3) 7 P. D. 113.
(4) Ibid. 116.
(5) 2 Curt. 320.

1949

In the Estate of Charles Gibson, decd.

Pearce J.

Lushington did not wholly agree with the decision in *Newton and Thomas* v. *Clarke* (1) and, so far as one is drawing inferences from the cases, I think that inferences drawn from *Hudson* v. *Parker* (2) are more cogent than those derived from *Newton* v. *Clark* (1).

In *Brown* v. *Skirrow* (3), the head-note reads, " . . . . " Where a testatrix signed her will in a shop, and one witness, " who saw her sign, attested it, but the other witness being " at the time when the testatrix and first witness signed " engaged at the other side of the shop with a person who " stood between him and the testatrix, did not see them sign " and did not know nor have the opportunity of knowing " anything about what they had been engaged upon until " after they had signed, when he was asked to be a witness : " *Held*, that the testatrix did not sign 'in the presence' of " the second witness." So far as that case bears on the problem before me, it tells against the validity of this codicil. It is interesting that in that case Barnes J., in the argument (4), propounded the question whether a blind person can witness a will, but unfortunately he did not give the answer to it.

After considering all the cases that have been cited to me, and getting as much advantage as I can from any of them, I think that when one of the witnesses is blind the will has not been signed " in his presence," and he is not able to attest it. In the particular circumstances of this case (if I am wrong in thinking that a blind man is always unable to witness a will) the circumstances are not such as to make it possible to say that the blind man was a witness and that the signing of the will was done " in his presence."

The codicil was therefore not made in accordance with the provisions of the Wills Act, and I pronounce against it.

Solicitors : *Stafford Clark & Co., for Ironside & Co., Leicester* ; *Wigan & Co. for Craston White, Leicester.*

(1) 2 Curt. 320.
(2) 1 Rob. Ecc. 14.
(3) [1902] P. 3.
(4) Ibid. 5.

J. B. G.

IN THE GOODS OF SPICER, DECD.

1949
July 21, 22.

Hodson J.

SPICER *v.* RICHARDSON.

Probate—Soldier's will—Oral declaration—Reference to former documentary will—Probate of nuncupative will.

A declaration by a soldier may be accepted as a valid nuncupative will although that declaration was made while he was referring to an earlier testamentary document; for such a declaration may go beyond a mere reference to an existing disposition, and stand by itself as an indication of what the deceased wished to be done with his estate, after his death.

In the Estate of Beech, decd.: Beech v. *Public Trustee and Others* [1923] P. 46, distinguished; *In re Stable, decd.*· *Dalrymple* v. *Campbell* [1919] P. 7, applied.

The deceased, when on military embarkation leave, put his hand to his breast pocket and pulled out a small book similar in appearance to a standard Army Pay Book (which would contain instructions and space for the making of a soldier's will), saying: "If anything happens to me, everything is to be for R." (the defendant). Evidence was given that the manner in which the book was produced by the deceased, and the words which he spoke, indicated to the witnesses that he was talking of something already written in his pay book. No other evidence of the relevant contents of his pay book was given.

Held, that the words of the deceased came within the decision in *In re Stable, decd.: Dalrymple* v. *Campbell* [1919] P. 7, namely: "It is not necessary for the validity of a soldier's "nuncupatory will to prove that he knew he was making a "will . . . . It is enough if he intended deliberately to give "expression to his wishes as to the disposition of his property "in the event of his death"; and it was immaterial whether the deceased or others thought that in making such a statement of his wishes it was necessary for him to refer to a document which was already in existence.

PROBATE ACTION.

The plaintiff was the mother of the deceased: she claimed that he died intestate and that she was the only person entitled to the estate. The defendant asked the court to pronounce for a will alleged to have been made in or about August, 1944, whereby he named the defendant his sole legatee and devisee. The defendant alleged that the deceased, who was then a soldier on actual military service, made the said will by declaring that if anything happened to him everything was to be the defendant's. When it was contended for the plaintiff at the trial that if such words had been used by the deceased

1949

In the Goods of Spicer, decd.

Spicer v. Richardson.

the deceased was not making a will, but was merely indicating the effect of a will which was already in existence (namely in his Army Pay Book), leave was given to amend the defence and counterclaim so as to cover such a will.

The deceased died in September, 1947. He and the defendant had been partners in a business for 26 years and during that period had lived together as man and wife. The defendant's husband had left her during the 1914–18 war and she did not know whether he were dead.

The deceased, who had served in the 1914–18 war, joined the army in February, 1944, and went abroad on active service on August 25, 1944. The nuncupative will was alleged to have been made on August 16, 1944, which was the last day of his leave.

It was stated (in the pleadings) that the deceased made a will by declaring that if anything happened to him everything was to be the defendant's. The defendant gave evidence in support, and said: "Before he left he was very upset, "and when he left he put his hand to his breast pocket and "pulled out a little book and said: 'If anything happens "'to me, everything belongs to you, do as you like with it.' "The book was a small one. I did not take all that notice. "We were both very upset. Red or brown, I could not "say." Evidence was also given by a friend, Mrs. Miller, who was sitting by the defendant at that time: her version of the language used was: "He said that if anything happened "to him everything was for 'Richie' here." In cross-examination, Mrs. Miller admitted that her impression was that the deceased was referring to something that he had already done. The language used, coupled with the gesture, the tapping of his pocket, the producing of the book, indicated to them that he was talking about something which he had written, presumably in his pay book.

The pay book itself was never found after Spicer's death and there was some evidence that he had lost it in 1945. There was no evidence, besides the deceased's statement, as to the possible contents of the pay book.

Alan Orr for the plaintiff. It was sufficient for the validity of a soldier's will that the soldier intended deliberately to give expression to his wishes as to the disposition of his property in the event of his death: *In re Stable, decd.: Dalrymple* v. *Campbell* (1), but in the present case there was

(1) [1919] P. 7.

no such intention. The alleged oral declaration was merely a reference to a written will previously made by the deceased, and the decision in *In the Estate of Beech, decd.: Beech* v. *Public Trustee and Others* (1) was applicable.

In so far as the defendant had relied upon a written will, its contents had not been proved.

John Latey for the defendant. In *In the Estate of Beech, decd.: Beech* v. *Public Trustee and Others* (1), the letters relied on did not amount to a soldier's will because they did not constitute any fresh expressions of testamentary wish. They were merely references to a previous will and nothing further. But if a soldier expresses his wishes and intentions afresh that expression is a good soldier's will whether or not it also includes a reference to a previous will. In the present case the deceased's words were not merely descriptive of what he had supposedly done but amounted to a fresh expression of testamentary wish and intention within the meaning stated by Horridge J. in *In re Stable, decd.: Dalrymple* v. *Campbell* (2). A soldier might make many wills in identical terms by reiterating, for example, on each of his leaves from overseas what he wanted done with his property.

If that were right it was unnecessary to prove the will in the pay book. Nor in this case did any question of revocation arise in relation to the oral will.

Hodson J. referred to the pleadings, to the close association between the defendant and the deceased, and to the evidence given by the defendant and Mrs. Miller which is quoted above, and continued: It is contended on behalf of the plaintiff that provided that these observations (as to his wishes if anything happened to him), were, in fact, made—which was not admitted—if the deceased was merely referring when he made them to something which he had already done, he was not making a will, he was merely indicating what was the effect of a will which was already in existence. The case relied upon in support of that proposition is *In the Estate of Beech, decd.: Beech* v. *Public Trustee* (1). It is a decision of the Court of Appeal concerning two letters written by a soldier in actual military service, which clearly referred to elaborate testamentary dispositions which he had already made. The position was this in *Beech's* case (1): that the letters paraphrased the effect of the wills or will and paraphrased the effect inaccurately, so that it was to the advantage of those contending for the admission of the letters as a soldier's will to get them admitted to probate. The court held that what the soldier was doing was merely referring, albeit inaccurately, to what he had already done by his will; and that is very clear from the note of the first letter and is also to be inferred from the note of the second. The note of the first letter was this: "I daresay you would like to know that I have left "you after me both Brandon and the Shawe estates, also "the London house." That is clearly indicating what he had done, or thought he had done, by his will, and it was held by the court that that was not a soldier's will but that he was indicating an existing testamentary disposition.

---

(1) [1923] P. 46. (2) [1919] P. 7.

If I accept the evidence of Mrs. Miller and the defendant, the declaration which this man made in this room on the last day of his leave goes beyond a reference to an existing disposition, and standing by itself is an indication of what was to be done with his estate after his death and comes within the decision of Horridge J. in *In re Stable, decd.: Dalrymple* v. *Campbell* (2). The headnote to that case reads: "It is not necessary for the validity of a soldier's "nuncupatory will to prove that he knew he was making "a will .... It is enough if he intended deliberately to "give expression to his wishes as to the disposition of his "property in the event of his death." I think that language of this kind, clearly stating what Spicer wanted to be done with his property after his death, comes within that definition, and it is immaterial whether, as Horridge J. pointed out, the deceased knew that his words could have any testamentary effect, and it is equally immaterial whether other people thought, or whether he himself thought, that he could only give testamentary effect to his wishes by referring to a document which was then in existence.

I need not deal in great detail, in view of the conclusion at which I have arrived, with the position of the pay book. Great efforts were made to find it but it never was found. When the difficulties, which arose from the argument that the oral declaration might be nothing more than a reference to a written statement, were emphasized, the pleading was amended so as to cover the case of a will contained in a pay

---

(1) [1923] P. 46.

(2) [1919] P. 7.

1949

IN THE GOODS OF SPICER, DECD.

SPICER v. RICHARDSON.

Hodson J.

book. It would in my opinion have been in any event very difficult for the court to have arrived at a conclusion as to what was written in the pay book, if it were necessary for the defendant to rely upon that as being the last will. I need not say anything further about the question which might have arisen in the case of revocation, because in my judgment the statement made by the deceased man to the defendant and to Mrs. Miller when he was on the eve of embarkation for overseas, was a soldier's will made by him when he was in actual military service and having the effect of disposing of his whole estate in favour of the defendant. The question of revocation not arising, it does not seem to be necessary to consider in any further detail the other evidence or the oral evidence which has been given as to the relationship between Mrs. Richardson and the deceased. I have already indicated that the evidence clearly shows to me that they were on good terms, and I have had some evidence that at the end of his life, when he was suffering from cancer, as he may well have suspected, and indeed when he was very near his death, he was saying that he wanted Mrs. Richardson to have his property.

(His Lordship referred to certain evidence, given on behalf of the plaintiff as to the deceased's presumed intentions which he did not accept, and concluded :) In my judgment the defendant succeeds in establishing an oral will as originally pleaded. The actual words of the will of August 16, 1944, are, in my opinion, most accurately to be taken from the evidence of Mrs. Miller, and are as follows : " If anything happens " to me everything is to be for Richie." I pronounce for the will in that form.

Solicitors for the plaintiff : *Iliffe, Sweet & Co. for Haddock, Pruen and Lintott, Cheltenham.*

Solicitors for the defendant : *Lovell, White and King, for Eckersall, Watterson & Moore & Co., Cheltenham.*

J. B. G.

END OF VOL. AND OF PROBATE SERIES FOR 1949.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1949, will be as follows:—

In the First Series,
[1949] Ch.
In the Second Series,
[1949] 1 K. B.   [1949] 2 K. B.   [1949] P.
In the Third Series,
[1949] A. C.

INDEX

APPEAL—Section 17 Married Women's Property Act. *See* PRACTICE.

ARTIFICIAL INSEMINATION. *See* NULLITY.

CONFLICT OF LAWS. *See* NULLITY.

CONNIVANCE. *See* DIVORCE.

COUNTY COURT. *See* PRACTICE.

CRUELTY. *See* DIVORCE.

CRUELTY—PERSISTENT CRUELTY. *See* JUSTICES.

DESERTION. *See* DIVORCE.

DIVORCE — *Adultery — Connivance — Husband's adulterous association with governess—Discovery by wife — Immediate offer to permit continuance of adultery—General course of conduct indicating wife's desire to preserve marriage and end husband's adultery.*
WOODBURY *v.* WOODBURY **C. A. 154**

2. —— *Adultery — Evidence — Period of gestation—Birth three hundred and forty-nine days after last opportunity of coitus—Effect of medical evidence.*
HADLUM *v.* HADLUM - - **C. A. 197**

3. —— *Alimony pendente lite — Wife granted decree of judicial separation—Found guilty of adultery on appeal—Application for continuation of alimony pending appeal to House of Lords—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 1, 27, 32, 176, 190, *sub-s.* 3.
CAVENDISH-BENTINCK *v.* CAVENDISH-BENTINCK - - - - **C. A. 203**

4. —— *Application for leave to present petition within three years of marriage—Exceptional hardship suffered by applicant—Exceptional depravity on part of proposed respondent—Instances of exceptional hardship or depravity—Matrimonial Causes Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 1.
IN THE MATTER OF A PROPOSED PETITION. BOWMAN *v.* BOWMAN **C. A. 353**

DIVORCE—*continued.*

5. —— *Cruelty — Constant and perpetual nagging—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 176 (*c*)—*Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 57), *s.* 2.
USMAR *v.* USMAR - **Willmer J. 1**

6. —— *Cruelty — Invalid wife — Excessive demands made on husband—Detriment to health—No intention to cause injury.*
SQUIRE *v.* SQUIRE - - **C. A. 51**

7. —— *Cruelty—Refusal of normal sexual relations.*
WALSHAM *v.* WALSHAM **Wallington J. 350**

8. —— *Cruelty — Respondent husband's fits of depression involving prolonged sulky silence—Domineering conduct of husband—Serious emotional disturbances caused to wife—Matrimonial Causes Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2.
LAUDER *v.* LAUDER - - **C. A. 277**

9. —— *Custody — Application for declaration that parent unfit to have custody of child—Desirability of such declaration when applicable—Guardianship of Infants Act,* 1886 (49 & 50 *Vict., c.* 27), *s.* 7—*Guardianship of Infants Act,* 1925 (15 & 16 *Geo.* 5, *c.* 45), *s.* 4.
S. *v.* S. - - - **Hodson J. 269**

10. —— *Desertion — Husband and wife living in same house — No marital relations for thirteen years—Spouses occupy separate bedrooms — No mending or washing of husband's clothes or separate cooking for husband by wife—Living rooms occupied by family consisting of husband, wife and two daughters—Meals for family cooked by wife—Constant feud between spouses terminating in husband leaving the house—No de facto separation before that time.*
HOPES *v.* HOPES - - **C. A. 227**

11. —— *Desertion — Sailor husband returns after four years' absence — Requests wife to reside, for unknown period, with him, at a port*

DIVORCE—*continued.*

—*Refusal by deaf wife with two children to leave present home—Reasonableness of refusal—Legal burden of proof throughout on husband to prove desertion without cause—Wife may seek to rebut inference from refusal by proving just cause—No legal burden of proof on wife—Matrimonial home—Whose choice ?*
Dunn *v.* Dunn - - **C. A. 98**

12. —— *Discretion — Procedure — Hearing in open court—Decision in judge's private room—Decree voidable—New trial.*
Stone *v.* Stone - - **C. A. 165**

13. —— *Domicile—English officer on active service abroad—Foreign domicile of choice acquired—Validity of American divorce.*
Donaldson (or Nichols) *v.* Donaldson (Donaldson intervening : Nichols cited) **Ormerod J. 363**

14. —— *Evidence — Admissibility of question in cross-examination — Allegation of promiscuous adultery—Particulars of certain specified occasions—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 198.
Barber *v.* Barber - - **Willmer J. 169**

15. —— *Evidence — Adultery — Uncorroborated evidence of " accomplice."*
Fairman *v.* Fairman - **Divl. Ct. 341**

16. —— *Evidence at hearing of petition—Statements made by husband or wife at interview with probation officer—Privilege.*
McTaggart *v.* McTaggart **C. A. 94**

17. —— *Evidence of adultery — Birth certificate—Name of father omitted—Births and Deaths Registration Act,* 1874 (37 & 38 *Vict., c.* 88), *ss.* 1, 7.
Mayo *v.* Mayo **Blanco-White Commr. 172**

18. —— *Evidence — Proceedings instituted in consequence of adultery—Parties and their spouses not only competent but compellable to give evidence—Condonation—Corroboration—Onus of proof—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 198—*Matrimonial Causes Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 4.
Tilley *v.* Tilley - - **C. A. 240**

19. —— *Husband and wife—Desertion—Husband reasonably believed by wife to be guilty of adultery—Offer by husband to resume cohabitation when grounds for wife's belief had disappeared—Wife's refusal—Effect on state of desertion—Actual resumption of cohabitation proved in appellate court.*
Everitt *v.* Everitt - - **C. A. 374**

20. —— *Husband's petition for divorce on ground of desertion—Previous maintenance order against husband—Adjudication by justices on question of desertion—Res judicata—Estoppel—Res judicata not pleaded.*
Winnan *v.* Winnan - - **C. A. 174**

21. —— *Practice—Injunction to restrain divorce proceedings in foregin court—Jurisdiction so to do—Rare exercise of such jurisdiction.*
Orr-Lewis *v.* Orr-Lewis **Willmer J. 347**

22. —— *Nullity — Marriage — Publication of banns—Concealment—The " true name "—Marriage Act,* 1823 (4 *Geo.* 4, *c.* 76), *ss.* 7, 22.
Dancer *v.* Dancer (Hare intervening) Marsden cited) - - **Ormerod J. 147**

23. —— *Re-hearing — Whether public interested requires a re-hearing—Application by respondent—Laches of respondent—Application for re-hearing refused—Matrimonial Causes Rules,* 1947, *r.* 36, *sub-r.* 1.
Tucker *v.* Tucker - - **Divl. Ct. 105**

24. —— *Variation of settlement — Husband petitioner's life policy—Beneficiary the wife of the assured during her life-time—Whether a settlement and therefore variable—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192.
Bown *v.* Bown and Weston **Wallington J. 91**

25. —— *Variation of settlement—Husband petitioner's life policy in name of respondent wife—Assurance for benefit and separate use of assured's wife absolutely—Whether a settlement and therefore variable—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192—*Married Women's Property Act,* 1882 (45 & 46 *Vict., c.* 75), *s.* 11.
Gunner *v.* Gunner and Stirling **Wallington J. 77**

DOMICILE. *See* Divorce.

ECCLESIASTICAL LAW — *Faculty — Removal of existing ornaments from Holy Table—Substitution of six candlesticks—Amended inscription—Number of candlesticks—" Good " order."*
In re The Church of the Holy Trinity. Woolwich **Chancellor E. Garth Moore 369**

ESTOPPEL. *See* Divorce.

EVIDENCE. *See* Divorce ; Legitimacy Declaration ; Probate.

HUSBAND AND WIFE — *Non-consummation of marriage—Impotence of husband petitioner—Whether petitioner can plead his or her own impotence—Court to act as nearly as possible in conformity with principles upon*

HUSBAND AND WIFE—*continued.*
which ecclesiastical courts acted in nullity cases—Applicability of pre-Reformation canon law.
Harthan *v.* Harthan - **C. A. 115**

2. —— *Nullity — Limitation — Alleged pregnancy at date of marriage — Alleged concealment of fraud—Petition more than a year after marriage — Matrimonial Causes Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 7, *sub-s.* 1 (ii).
Chaplin *v.* Chaplin - - **C. A. 72**

JURISDICTION. *See* Nullity; Justices.

JUSTICES — *Jurisdiction — Husband ordinarily resident in Scotland — Summary Jurisdiction (Separation and Maintenance) Acts,* 1895 *to* 1925—*Summary Jurisdiction (Process) Act,* 1881 (44 & 45 *Vict., c.* 24.)
Macrae *v.* Macrae - - **Divl. Ct. 270**

2. —— *Jurisdiction — Husband ordinarily resident in Scotland—Summary Jurisdiction (Separation and Maintenance) Acts,* 1895 *to* 1925—*Summary Jurisdiction (Process) Act,* 1881 (44 & 45 *Vict., c.* 24).
Macrae *v.* Macrae - - **C. A. 397**

3. —— *Persistent cruelty — Degree of cruelty—Just cause for leaving—Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 *Vict., c.* 39), *ss.* 4, 5.
Barker *v.* Barker - - **Divl. Ct. 219**

3. —— *Withdrawal of summons—Whether withdrawal acts as estoppel—Summary Jurisdiction (Separation and Maintenance) Acts,* 1895 *to* 1925.
Land *v.* Land - - - **Divl. Ct. 405**

LEGITIMACY — *Evidence — Declaration by deceased relative—Deceased declarant alleged to be natural grandfather of petitioner—Admissibility.*
Presumption of paternity arising from marriage of alleged parents—Legitimacy Act, 1924 (16 & 17 *Geo.* 5, *c.* 60).
Costs awarded against intervener.
Battle *v.* Attorney-General (Battle, G. L. and Battle A. F. intervening)
Hodson J. 358

2. —— *Issue on maintenance — Application as to paternity—" Non-Access " of* 340 *days.*
M. T. *v.* M. T. and the Official Solicitor (Guardian ad litem for an infant)
Ormerod J. 331

3. —— *Validity of marriage of petitioner's parents—Requirement of twenty-one days' notice of marriage—Presumption of validity—Marriage Act,* 1823 (4 *Geo.* 4, *c.* 76), *s.* 22—*Marriage Act,* 1836 (6 & 7 *Will.* 4, *c.* 85), *ss.* 10, 42—*Marriage Act,* 1898 (61 & 62 *Vict., c.* 58), *ss.* 1, 4, 6, 15.
Russell *v.* Attorney-General
Barnard J. 391

LIMITATION. *See* Husband and Wife.

MARRIAGE. *See* Divorce; Legitimacy.

NULLITY — *Incapacity of husband respondent—Child born as result of artificial insemination from husband's seed—Sincerity of wife petitioner—Approbation—Public policy.*
R. E. L. (otherwise R.) *v.* E. L.
Pearce J. 211

2. —— *Jurisdiction — Ground of petition, wilful refusal to consummate—Husband's domicile and residence, Canadian—Wife's pre-marriage domicile and residence, English—Marriage in England—Husband resident in Canada when petition brought.*
Casey *v.* Casey - - **C. A. 420**

3. —— *See* Divorce.

PRACTICE—*Jurisdiction—Appeal—Application under s.* 17 *of the Married Women's Property Act,* 1882 (45 & 46 *Vict., c.*75) *before registrar or master—Appeal lies to judge in chambers—R. S. C.* 1883, *Or.* 54, *rr.* 12A, 21 *and* 22A—*Matrimonial Causes Rules,* 1947, *rr.* 59, 82.
Bernbaum *v.* Bernbaum **C. A. 325**

2. —— *Trial of action in county courts—Court of Probate Act,* 1857 (20 & 21 *Vict., c.* 77), *s.* 59)—*Court of Probate Act,* 1858 (21 & 22 *Vict., c.* 95), *s.* 10—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 150—*County Courts Act,* 1934 (24 & 25 *Geo.* 5, *c.* 53), *ss.* 60, 61.
In the Estate of Rachel Thomas, decd. Davies and Others *v.* Davies and Another - - - - **Barnard J. 336**

3. —— *See* Divorce.

PRIVATE INTERNATIONAL LAW. *See* Probate.

PROBATE—*Airman training as pilot, in time of war, in Saskatchewan—" Being in " actual military service "—Unattested will—Wills Act,* 1837 (7 *Will.* 4 & 1 *Vict., c.* 26), *s.* 11—*Wills (Soldiers and Sailors) Act,* 1931 (7 & 8 *Geo.* 5, *c.* 58), *ss.* 2 *and* 5.
In re Wingham, decd. Andrews *v.* Wingham - - - - **C. A. 197**

2. —— *Evidence — Admissibility — Evidence to rebut that of attesting witnesses.*
Vere-Wardale decd. Vere-Wardale *v.* Johnson and Others **Willmer J. 395**

PROBATE—*continued.*

3. —— *Private International Law—Executors—Testator domiciled abroad—English will executed in England—Property in Great Britain and the British Empire.*
In the Estate of Goenaga, decd. **Ormerod J. 367**

4. —— *Soldier's will — Oral declaration—Reference to former documentary will—Probate of nuncupative will.*
In the Goods of Spicer, decd. Spicer *v.* Richardson - - **Hodson J. 441**

5. —— *Will — Attestation — Totally blind witness—Want of due execution—Wills Act,* 1837 (1 *Vict., c.* 26), *s.* 9.
In the Estate of Charles Gibson, decd. **Pearce J. 434**

PROCEDURE. *See* Divorce.

RES JUDICATA. *See* Divorce.

SHIPPING — *Collision — War operation — Troopship in convoy escorted by naval vessels—Admiralty instructions—High speed maintained in dense fog—Collision with unknown ship on crossing course—Negligent navigation by both—Escort vessels equipped with radar apparatus—Reliance of convoy for information—Failure to warn—Contributory negligence of Senior Escort Officer—Liability—At common law—Maritime Conventions Act,* 1911, *not applicable—Maritime Conventions Act,* 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1, *sub-s.* 1 ; *s.* 9, *sub-s.* 4.
The Sobieski - - - **C. A. 313**

2. —— *Ship — Stranding — Narrow channel approach to dock—Port facilities advertised by harbour authority—Inset plan published on Admiralty coastal chart—Warranty to maintain depth and area of navigable channel by dredging — Obstruction caused by silt—Negligence of harbour authority,—Failure to warn pilot and shipowner—Local knowledge of compulsory pilot—Liability of harbour authority in tort and in contract—Harbours Docks and Piers Clauses Act,* 1847 (10 & 11 *Vict., c.* 27), *s.* 74—*Pilotage Act,* 1913 (2 & 3 *Geo.* 6, *c.* 31), *s.* 15.
Owners of the Steamship Towerfield *v.* Workington Harbour and Dock Board. The Towerfield - - **C. A. 10**

SOLDIER'S WILL. *See* Probate.

VARIATION OF SETTLEMENT. *See* Divorce.